No. 86-393

Supreme Court, U.S.
FILED
SEP 9 1986
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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120 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in reviving a Federal Tort Claims Act suit for injuries allegedly received by a serviceman during active duty participation in an official Army drug experimentation program, where the district court had entered an order under Fed. R. Civ. P. 54(b) dismissing the action pursuant to *Feres* v. *United States*, 340 U.S. 135 (1950), and no appeal was filed challenging that dismissal.

2. Whether a serviceman may pursue an action against his superior officers for alleged constitutional violations arising from his participation in an official Army drug experimentation program.

PARTIES TO THE PROCEEDING

In addition to the United States, the petitioners are Richard Helms, Joseph R. Bertino, M.D., Sidney Gottlieb, M.D., Bernard G. Elfert, Van Sim, M.D., H.D. Collier, and Albert Dreisbach. In addition, the state defendants in the proceedings below are the Board of Regents of the University of Maryland, Gerald Klee, M.D., and Walter Weintraub, M.D. The respondent is James B. Stanley.

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The Solicitor General, on behalf of the United States (Question 1), and on behalf of Richard Helms, Joseph R. Bertino, M.D., Sidney Gottlieb, M.D., Bernard G. Elfert, Van Sim, M.D., H.D. Collier, and Albert Dreisbach (Question 2), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 786 F.2d 1490. The district court's orders granting the motion to dismiss the United States and denying the motion to dismiss the individual federal defendants (App., *infra*, 54a-66a)

are reported at 549 F. Supp. 327 and 552 F. Supp. 619. The district court's orders reconsidering its denial of the motion to dismiss the individual federal defendants (App., *infra*, 21a-53a) are reported at 574 F. Supp. 474 and 587 F. Supp. 1071. The court of appeals' prior opinion vacating an earlier district court order of summary judgment in favor of the United States (App., *infra*, 67a-95a) is reported at 639 F.2d 1146.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1986. A petition for rehearing was denied on June 17, 1986 (App., *infra*, 96a-97a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671 *et seq.*], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

1. Stanley was an enlisted man who participated in secret chemical warfare tests conducted by the United States Army at the Army's Chemical Warfare

Laboratories on the Aberdeen Proving Grounds in Maryland in 1958. He volunteered to participate in the program while on active duty and was administered, without his knowledge, lysergic acid diethylamide (LSD) as part of that testing. In 1975, six years after his discharge, Stanley brought suit under the Federal Torts Claims Act (FTCA) alleging that the government had been negligent in administering the LSD and negligent in failing to monitor his condition after discharge.

These FTCA claims were dismissed by the district court, which held that the FTCA claims were barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950). The Fifth Circuit affirmed in 1981 (App., *infra*, 67a-95a). Finding that "the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship," the court of appeals stated that "we are compelled to conclude that the trial court correctly applied *Feres* and held the United States immune to Stanley's suit under the Federal Tort Claims Act" (*id.* at 76a, 79a). The court of appeals, however, remanded the case to the district court for further proceedings, finding, without expressing any opinion on the merits, that plaintiff "has at least a colorable constitutional claim based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 * * * (1971)" (*id.* at 94a).[1]

2. On remand, plaintiff amended his complaint to allege new FTCA claims against the United States and to add *Bivens* claims against his superior officers

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[1] In so holding, the Fifth Circuit relied (App., *infra*, 94a) on an opinion which was subsequently overturned by the en banc Third Circuit in *Jaffee* v. *United States*, 663 F.2d 1226 (1981), cert. denied, 456 U.S. 972 (1982).

and the civilians who had participated in the program. In 1982, the district court dismissed the amended FTCA claims on the basis of the Fifth Circuit's opinion. However, relying on the Ninth Circuit's decision in *Wallace* v. *Chappell*, 661 F.2d 729 (1981) (App., *infra*, 62a), the court declined to dismiss the *Bivens* claims against the individual defendants. Shortly thereafter, on November 9, 1982, the district court entered, at the request of the United States, a partial final judgment dismissing all the FTCA claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (App., *infra*, 54a-55a).[2] In the same order, the district court ordered plaintiff to identify and serve at least one individual defendant, and plaintiff filed a second amended complaint naming the individual petitioners.[3] Plaintiff did not ap-

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[2] Rule 54(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

[3] In his amended complaint, plaintiff alleged that "[t]he wrongful act of the Defendants consists of an intentional act [while] Plaintiff was on active duty and subsequent negligent failure to protect Plaintiff, after becoming a civilian, from the dire consequences flowing from the original wrong" (Second Amended Complaint ¶ 11). Plaintiff further alleged that the defendants were "federal executive department officials and agents, who were acting under color of a covert federal Army problem" [*sic*] (*id.* at ¶ 14). The complaint asserted

peal from the entry of the final judgment dismissing the FTCA claims.

Subsequently, this Court reversed the Ninth Circuit's decision in *Chappell*, holding that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (*Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983)).[4] The district court, acting sua sponte, reconsidered its prior refusal to dismiss plaintiff's *Bivens* claims in light of this Court's decision in *Chappell* (App., *infra*, 21a-53a). The district court concluded that *Chappell* was not controlling because "plaintiff in the instant case did not participate in the Army's testing program because a superior officer

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that the alleged conduct of the defendants violated his "constitutional right to privacy * * * implicit in the First, Third, Fourth and Ninth Amendments * * * [and] * * * implicit in the concept of liberty within the Fifth Amendment Due Process Clause, and generally within the 'penumbras' of the Bills [*sic*] of Rights" (*id.* ¶ 17). Plaintiff also named as defendants the Board of Regents of the University of Maryland and several physicians who were employees of the University of Maryland, alleging that these state defendants participated in the testing program pursuant to "an agreement or contract" (*id.* ¶ 20). Plaintiff asserted claims under 42 U.S.C. 1983 (Count II) and 42 U.S.C. 1985 (Count III) against these defendants. The lower courts have not addressed the counts relating to the state defendants (App., *infra*, 20a), which are not involved in this petition.

[4] The Court so held because of " 'special factors counselling hesitation' " to authorize a *Bivens* remedy (462 U.S. at 298, quoting *Bivens*, 403 U.S. at 396). The Court concluded that the "unique * * * structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers" (462 U.S. at 304).

ordered him to do so; instead * * * he volunteered" (*id.* at 33a-34a). The district court then certified this order for interlocutory appeal under 28 U.S.C. 1292(b) (App., *infra*, 6a).

3. The court of appeals affirmed the district court's refusal to dismiss the *Bivens* claims. The court held that a case-by-case analysis is required under *Chappell* to determine whether a particular *Bivens* suit would undermine military discipline. Noting that plaintiff had been a volunteer and had not been told that he was ingesting LSD, the court reasoned that he "could not possibly have challenged his 'orders' to drink the clear substance" (App., *infra*, 12a). Therefore, the court concluded, "'[t]he inescapable demands of military discipline and obedience to orders' are not implicated by the facts of this case" (*ibid.* (quoting *Chappell*, 462 U.S. at 300)).

The court of appeals also found absent the other special factor of "Congress's plenary authority over the military and its extensive activity in the field" (App., *infra*, 12a). That factor was absent, the court ruled, because the "intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the violations complained of here" because he did not have available to him "the remedies provided under article 138 of the Uniform Code of Military Justice" (*id.* at 12a-13a).

Having found that the "special factors" mentioned by this Court in *Chappel* were absent, the court also ruled that plaintiff's suit was not precluded by the remedial scheme afforded by the Veterans Benefits Act, 38 U.S.C. 301 *et seq.*, under the "adequate alternative remedy" analysis of *Carlson* v. *Green*, 446

U.S. 14, 18-19 (1980). Reasoning that the Act would not adequately compensate plaintiff, the court of appeals concluded that the Act was not the exclusive remedy for servicemen "injured while acting incident to military service" (App., *infra*, 15a). The court did not address petitioners' principal argument that the Veterans' Benefits Act was evidence of Congress's activity in the field and was thus relevant under *Chappell*.

The court of appeals went on to reverse the district court's 1982 Rule 54(b) final judgment dismissing plaintiff's FTCA claims against the United States. Ignoring the absence of any appeal from that final judgment, as well as the absence of the United States as a party on the appeal and the abence of briefing on the issue, the court reinstated plaintiff's FTCA claims against the United States. In thus overruling the Fifth Circuit's 1981 decision, the court acknowledged that that decision was the " 'law of the case,' " but reasoned that it need not be followed because "controlling authority has since made a contrary decision of the law applicable to the issue" (App., *infra*, 17a).

The court of appeals held that this "controlling authority" was provided by *Johnson* v. *United States*, 779 F.2d 1492 (11th Cir. 1986) (en banc), petition for cert. pending, No. 85-2039, and *Cole* v. *United States*, 755 F.2d 873 (11th Cir. 1985). Relying also on *United States* v. *Shearer*, No. 84-194 (June 27, 1985), the court held that "under *Johnson*, *Cole*, and *Shearer*, this case requires the case-by-case analysis to determine whether the purpose of the *Feres* doctrine would be served by precluding Stanley's FTCA claim against the government" (App., *infra*, 19a).

Concluding that no such purpose would be served, the court remanded the case with instructions to allow plaintiff to amend his complaint "to plead consistent with recent precedent" (*id.* at 20a).

REASONS FOR GRANTING THE WRIT

The court of appeals' decision in this case is rife with error with respect to the *Feres* doctrine, both as applied to the FTCA claims and as applied to the *Bivens* claims. Both of these issues are of great practical importance to the armed services, so review by this Court is warranted.

The court of appeals' assertion of jurisdiction for the purpose of resurrecting plaintiff's FTCA claims, despite the fact that their dismissal pursuant to Rule 54(b) was not appealed, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In addition, plaintiff's FTCA claims are clearly barred by the *Feres* doctrine, since his alleged injuries were incurred "incident to service" (340 U.S. at 146). The court of appeals' contrary holding conflicts with numerous decisions of other circuits, as we have explained more fully in our petition (at 6-7) in *United States* v. *Johnson*, No. 85-2039.

Issuance of a writ of certiorari is independently appropriate to review the court of appeals' decision that plaintiff may pursue his *Bivens* claims. This holding, if allowed to stand, will reopen an area previously thought to have been settled by this Court's ruling in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), and, contrary to this Court's decision in that case, will expose military personnel to personal liability for their actions. Furthermore, the court of appeals' de-

cision directly conflicts with decisions of three other circuits. *Mollnow* v. *Carlton*, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); *Gaspard* v. *United States*, 713 F.2d 1097 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); and *Jaffe* v. *United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982).

1. a. The court of appeals' sua sponte assertion of jurisdiction to reverse the final judgment dismissing the FTCA claims against the United States that plaintiff never appealed is clearly wrong. As this Court has noted, "[i]f no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is '"mandatory and jurisdictional."'" *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (quoting *Browder* v. *Director, Illinois Dep't of Corrections*, 434 U.S. 257, 264 (1978)).[6]

The rule that a court of appeals lacks jurisdiction in the absence of the filing of a timely notice of appeal is fully applicable to a failure to appeal from a Rule 54(b) final judgment. A central purpose of Rule 54(b) certification is to establish a definite starting point for appellate proceedings. See *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435-436 (1956); *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 8 (1980). The repose and definiteness afforded by this rule are defeated if the absence

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[6] The court of appeals' exercise of jurisdiction over the FTCA claims cannot be viewed as a mere oversight. In its recitation of the facts, the court acknowledged that final judgment had been entered on the FTCA claims in 1982 (App., *infra*, 5a). In addition, we pointed out that the court lacked jurisdiction over the FTCA claims in our petition for rehearing and suggestion of rehearing en banc, which was denied without opinion.

of an appeal from a Rule 54(b) judgment may be disregarded. See *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950) (holding, in a case arising before the effective date of Rule 54(b), that the failure to appeal from an interlocutory final decree forfeited any right to appellate review). The decisions of the lower courts uniformly hold that a judgment entered under Rule 54(b) must be appealed within the time permitted by Rule 4 of the Federal Rules of Appellate Procedure. *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1549 (11th Cir. 1986); *Smith* v. *Mine Safety Appliances Co.*, 691 F.2d 724, 725 (5th Cir. 1982); see generally, *Exchange National Bank* v. *Daniels*, 763 F.2d 286, 291-292 (7th Cir. 1985); 1B J. Moore, *Moore's Federal Practice* ¶ 0.404[1], at 118 n.4 (2d ed. 1984).

The facts of this case illustrate the mischief flowing from a refusal to respect the finality afforded by Rule 54(b). The court of appeals' jurisdiction in this case was predicated on Section 1292(b) to review the separate *Bivens* issue certified by the district court, and it was on that basis that the parties briefed and argued the case. The United States did not appear on appeal before the Eleventh Circuit because it had been dismissed as a party. Yet, without any warning, the court resurrected the FTCA claims against the United States, thus depriving the United States of its basic right to be heard.

b. Apart from the court of appeals' lack of jurisdiction, its decision that plaintiff's FTCA claims are not barred by the *Feres* doctrine is incorrect on the merits. As explained more fully in our petition in *Johnson*,[6] under the *Feres* doctrine a service member

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[6] A copy of our petition for a writ of certiorari in *Johnson* has been furnished to counsel for respondent.

"may not recover under the Federal Torts Claims Act for injuries which 'arise out of or are in the course of activity incident to service.'" *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 4-5 (quoting *Feres*, 340 U.S. at 146). In this case, there is no dispute that plaintiff's alleged injuries were incurred incident to military service.[7] Nevertheless, relying on its decision in *Johnson* v. *United States*, 749 F.2d 1530 (1985), reinstated, 779 F.2d 1492 (1986) (en banc), the Eleventh Circuit faulted the Fifth Circuit for failing in 1981 to "proceed to the next level of inquiry to determine whether the considerations underlying the *Feres* doctrine militated against permitting Stanley to bring the FTCA claim" (App., *infra*, 17a). According to the court of appeals, the law in the Eleventh Circuit is now that each case must be examined to determine whether the considerations underlying the *Feres* doctrine require preclusion of the particular suit at bar. As we have explained in our petition in *Johnson* (at 9-16), that conclusion, which conflicts with numerous decisions of other courts of appeals (*id.* at 6-7), is contrary to the rule that if an injury is incurred incident to military

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[7] The Fifth Circuit so held in 1981, ruling that "the relationship between [plaintiff] and the allegedly negligent individuals stemmed from their official military relationship" (App., *infra*, 76a). The conclusion that plaintiff was injured incident to service is plainly correct. This suit is by an enlisted man against his superior officers and others acting under the control of the Army for their alleged negligence in carrying out their duties pursuant to an official Army program, and plaintiff was on active duty at the Army's Chemical Warfare Laboratories on the Aberdeen Proving Grounds in Maryland when the alleged injuries took place.

service, then the injured service member cannot bring an FTCA suit, as the Court held in *Feres*.[8]

In *United States* v. *Shearer*, No. 84-194 (June 27, 1985), this Court recently reiterated the rule that service members may not recover for injuries which arise incident to service. The Court there rejected the plaintiff's argument that the Army had been negligent in failing to exercise better control over the activities of the service member who murdered the plaintiff's decedent, reasoning that such a suit "goes

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[8] Moreover, in this case the Eleventh Circuit far extended its decision in *Johnson*. In *Johnson*, the allegedly negligent government employees were civilian air traffic controllers employed by the Federal Aviation Administration and not in the military chain of command. On those facts the court held that a case-by-case inquiry was required in cases falling outside of "the typical *Feres* factual paradigm—an FTCA suit for injuries or death allegedly caused by the negligence of a serviceman or an employee of the armed services" (749 F.2d at 1537). Thus, even if the Court should decide that there is merit to the Eleventh Circuit's holding in *Johnson* that the *Feres* doctrine bars recovery by service members only when they are injured by others in the military chain of command, such a decision would not mean that plaintiff's FTCA claims, which clearly fall in the "*Feres* factual paradigm," are not barred.

If our petition in *Johnson* is granted and the Court rules in our favor in that case, then it will be clear that the court of appeals erred in its analysis of the FTCA claims in this case. Accordingly, the Court may want to hold Question 1 for disposition in light of *Johnson*. We do not think that it would be sensible to grant Question 1 here and hold our petition in *Johnson*, however, because the court of appeals here clearly erred in concluding that it had jurisdiction over plaintiff's FTCA claims, making it unlikely that the Court would reach the merits on the FTCA issue here. In addition, we think that plenary review of Question 2 is warranted, even if this Court grants our petition in *Johnson*, because *Johnson* does not involve *Bivens* actions (see note 10, *infra*).

directly to the 'management' of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman" (slip op. 6 (footnote omitted)). As the Court explained, such a suit would necessarily "mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions" (*ibid.*). Such decisions, the Court reasoned, are "decision[s] of command," and suits attacking such decisions are "the *type* of claims, that if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*id.* at 6-7 (emphasis in original)).

Here, as in *Shearer*, the plaintiff is challenging "decision[s] of command," *i.e.*, decisions concerning whether and how to use Army volunteers in conducting chemical warfare experiments in the late 1950s. The acts in issue unquestionably were committed pursuant to military orders in carrying out this official Army program. Plainly, plaintiff's suit will necessarily involve second-guessing of the military decisions concerning the manner and use of Army personnel. Plaintiff's status as a volunteer is therefore irrelevant, as the Fifth Circuit held in 1981 (App., *infra*, 73a-74a). Since the decisions plaintiff questions are no different in principle than the military personnel decisions at issue in *Shearer*, there can be no question that plaintiff's suit is precisely the "*type*" of suit (*Shearer*, slip op. 6) which, if allowed generally, would embroil civilian courts in managing military personnel decisions.[9]

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[9] Contrary to the court of appeals (App., *infra*, 19a), the Eleventh Circuit's *Feres* analysis finds no support in this Court's statement in *Shearer* that " '[t]he *Feres* doctrine can-

2. The Eleventh Circuit compounded its erroneous application of the *Feres* doctrine in holding that plaintiff may pursue his *Bivens* claims.[10] This ruling flies in the face of this Court's unequivocal holding in *Chappell:* "We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (462 U.S. at 305). This statement of the Court's holding makes plain that a case-by-case analysis as to whether military discipline would be undermined by a particular suit is not permitted. Rather, the holding in *Chappell* is based on the principle that any suit for damages by an enlisted man against his superior officers necessarily undermines military discipline.

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not be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases,'" (*Shearer,* slip op. 5). That remark was made in the context of rejecting the "bright-line" rule adopted by the Third Circuit that the *Feres* doctrine did not bar a FTCA suit where the plaintiff's decedent was off-duty and off-base when killed by a fellow service member.

[10] In our view, similar misunderstanding of the *Feres* doctrine led the court of appeals to err in its analysis of the *Bivens* claims here and to err in its analysis of the FTCA claims here and in *Johnson.* As this Court's decision in *Chappell* makes clear, the concerns underlying the *Feres* doctrine lead to the conclusion that service members injured incident to military service may pursue neither FTCA claims nor *Bivens* claims. Nevertheless, since FTCA actions and *Bivens* suits differ in some respects, and since there are factual differences between this case and *Johnson,* we think that plenary review of Question 2 is warranted, perhaps in tandem with *Johnson,* even if this Court grants our petition in *Johnson* and holds Question 1 for disposition in light of *Johnson* (see note 8, *supra*).

The Eleventh Circuit's reading of *Chappell* is in conflict with the specific holdings of three other circuits. *Gaspard* v. *United States*, 713 F.2d 1097 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); *Mollnow* v. *Carlton*, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); and *Jaffee* v. *United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982). In *Gaspard*, the Fifth Circuit reasoned that "[t]he need for plenary discretion in military affairs and the existence of an adequate, congressionally-imposed compensation scheme instruct us to avoid either imposing *or inquiring into* monetary damages when a service person is injured" (713 F.2d at 1103 (emphasis in original)). Similarly, in *Mollnow*, the Ninth Circuit ruled that "[b]y rejecting this court's consideration of such reviewability factors as the adequacy of the intraservice remedy, we believe the Court [in *Chappell*] necessarily imposed a *per se* prohibition on the filing of *Bivens*-type actions by servicemen against their superiors" (716 F.2d at 630).

Rather than relying on the Court's statement of its holding in *Chappell*, the court of appeals instead focused on the Court's observation that "[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service" (462 U.S. at 304). Viewing this statement as a rejection of a per se rule disallowing *Bivens* suits, the court of appeals reasoned that the decision in *Chappell* permits case-by-case determinations as to whether the " 'special factors' " that the Court in *Chappell* concluded militated against permitting service members to pursue *Bivens* suits against their superior officers were in fact present

(App., *infra*, 11a). In reaching this conclusion, the court below failed to note that no case involving money damages was cited in *Chappell* for the proposition that service members are not barred entirely from obtaining relief in civilian courts. In contrast, both the Fifth Circuit and the Ninth Circuit properly read this observation as applying to suits for a writ of habeas corpus or injunctive relief, and not to damage actions against superior officers. *Gaspard*, 713 F.2d at 1103 n.12; *Mollnow*, 716 F.2d at 629 n.4. Similarly, while decided before *Chappell*, the Third Circuit in *Jaffee* anticipated the reasoning of this Court in *Chappell*, holding that the principles underlying the *Feres* doctrine precluded *Bivens* actions by service members against their superior officers (663 F.2d at 1236-1237).[11]

Even if the permissibility of a *Bivens* action somehow turns on a case-by-case analysis of special factors, the analysis offered by the court below plainly gave inadequate consideration to the need for military command and discipline. The "unique structure" of the military is present in this case regardless of whether plaintiff volunteered to participate in the program pursuant to which he was administered LSD. The defendants, plaintiff's superior officers, were acting within the military command structure and were obeying their orders in carrying out the

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[11] With the exception of the decision in this case, the district courts have been unanimous in reading the Court's decision in *Chappell* as absolutely barring *Bivens* claims by enlisted personnel against their superior officers. *Alvarez* v. *Wilson*, 600 F. Supp. 706 (N.D. Ill. 1985); *Benvenuti* v. *Department of Defense*, 587 F. Supp. 343 (D.D.C. 1984); *Hampton* v. *United States*, 575 F. Supp. 1180 (W.D. Ark. 1983); *Bishop* v. *United States*, 574 F. Supp. 66 (D.D.C. 1983).

chemical warfare experiments attacked by plaintiff's suit. This suit therefore will necessarily require judicial second-guessing of those military orders. Whatever the wisdom of the decision to conduct such experiments in 1958, the *Feres* doctrine as applied by this Court in *Chappell* makes clear that it is not the task of the judiciary to second-guess that decision through damage suits by enlisted men against their superior officers.

In addition, the court of appeals misconstrued this Court's observation in *Chappell* that Congress had enacted the Code of Military Justice under which the claims of discrimination involved in that case could have been addressed. "Congress' activity in the field," this Court reasoned, constituted a second special factor precluding a *Bivens* remedy, even though the Code of Military Justice did not permit any recovery of damages (462 U.S. at 304). The court of appeals here concluded that "[t]hose intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the violations complained of here" because "Article 138 [of the Code of Military Justice] is not available to veterans" (App., *infra*, 12a-13a). This reasoning misses the point made in *Chappell* that "Congress' activity in the field"—not the adequacy of the remedy and certainly not whether the specific statute at issue there provided a remedy here—itself argues against a *Bivens* remedy. In this case, Congress's activity in the field is its enactment of the Veterans Benefits Act, and the independent significance of that activity was not

considered by the court of appeals.[12] Indeed, by holding that this special factor is absent because the Code of Military Justice is unavailable to veterans, the Eleventh Circuit has limited *Chappell* to cases involving only that statute. Such a holding is impossible to defend—the Veterans Benefits Act was the congressional activity in the field that the Court found precluded the FTCA claim in *Feres*. See *Gaspard*, 713 F.2d at 1103-1104.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1986

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[12] The court of appeals addressed the Veterans Benefits Act in the context of rejecting it as an alternative adequate remedy under the analysis of *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980) (App., *infra*, 13a-14a, & n.4). Contrary to the court of appeals' statement (*id.* at 13a), defendants had never argued that the Act was a fully adequate alternative remedy, but had argued instead that the Act constituted "Congress' activity in the field" under the analysis of *Chappell*. The court of appeals simply ignored this argument.

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 84-5273

JAMES B. STANLEY, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, and
JOSEPH R. BERTINO, ET AL., DEFENDANTS-APPELLANTS

Apr. 21, 1986

Appeal from the United States District Court
for the Southern District of Florida

Before HATCHETT, Circuit Judge, HENDERSON *, Senior Circuit Judge, and ALLGOOD **, Senior District Judge.

HATCHETT, Circuit Judge:

We are again faced with the task of defining the limits of the doctrine first annouced in *Feres v.*

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* See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), to determine whether a former serviceman may maintain this lawsuit against federal officials, both civilian and military, for injuries suffered before or after his discharge from military service. In affirming, we permit the lawsuit.

Appellants, several military personnel and civilians, appeal the district court's finding that the complaint in this case states a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) and that the action is not barred by *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983).[1]

FACTS

In February, 1958, appellee, James B. Stanley was a master sergeant in the United States Army. Stanley volunteered to participate in a program purportedly designed to develop and test military equipment and protective clothing for use during chemical warfare. On four occasions during the program, unknown to him, Army officials and others gave Stanley lysergic

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[1] The individual defendants are Joseph R. Bertino, M.D.; H.D. Collier; Albert Dreisbach; Bernard G. Elfert; Sidney Gottlieb, M.D.; and Van Sim, M.D., all of whom are or were federal employees or officers of the United States Army. Richard Helms, former director of the Central Intelligence Agency is also named as a defendant. The individual state defendants who were added are the Board of Regents of the University of Maryland; Gerald Klee, M.D.; and Walter Weintraub, M.D. Klee and Weintraub were physicians in the psychiatric residency program at the University of Maryland Hospital and participated in the 1958 experiments under a research contract between the United States Army and the University of Maryland.

acid diethylamide (LSD). After the 1958 LSD experiments, Stanley served in the Army for eleven years. The Army discharged him in 1969. The Army never informed Stanley that he had been administered LSD during the 1958 program. Stanley did not become aware of the LSD experiments until December, 1975, when the Department of the Army sent him a letter soliciting his participation in a follow-up study of persons who had been subjects of the 1958 experiments.

PROCEDURAL HISTORY

The original complaint in this case was filed on May 8, 1978, and consisted of claims against the United States under the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b), 2671-2680 (West 1984) (FTCA), for negligent administration of the LSD experiments.[2] The district court granted the government's motion for summary judgment relying on the doctrine enunciated in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). Under the *Feres* doctrine, "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service." *Feres*, 340 U.S. at 146, 71 S.Ct. at 159.

On appeal, the former Fifth Circuit held that the district court's application of the *Feres* doctrine was

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[2] Stanley's original complaint named the Central Intelligence Agency, the United States Department of Defense, and the United States Army as defendants. The complaint was amended to name the United States Government as the proper party defendant under the Federal Tort Claims Act. "Unknown individual federal agents and officers" were also named as defendants.

correct insofar as it precluded Stanley's claim for injuries sustained while he was in military service, but that the district court had improperly granted the government's motion for summary judgment. According to the former Fifth Circuit, the proper disposition of the case was dismissal of the complaint for lack of subject matter jurisdiction. *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. Unit B 1981) (*Stanley I*). The case was remanded to the district court for consideration of any amendment that Stanley might offer to cure the jurisdictional defect by alleging damages for injuries which occurred after his discharge from the Army.[3]

On July 21, 1981, Stanley amended his complaint to allege both a post-discharge claim for negligence under the FTCA and a constitutional tort claim under *Bivens*. On October 15, 1982, the district court dismissed Stanley's post-discharge FTCA and *Bivens* claims against the United States Government. The district court held, however, that Stanley had stated a *Bivens* action against the individual federal agents and officers who participated in the LSD experiments, for violation of his constitutional "rights of privacy and bodily integrity, and of the right of an individual to control his mind, his private thoughts and his in-

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[3] The former Fifth Circuit expressly rejected the government's argument that it would be futile to remand the action because any amendments which Stanley might make, including any constitutional claim, would be barred by *Feres*. The court declined to express any opinion on the merits of any new claims which Stanley might assert, but found that "Stanley has at least a colorable constitutional claim based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 69 (1971)." *Stanley I*, 639 F.2d at 1159 (citations omitted).

tellectual process." *Stanley v. United States*, 549 F. Supp. 327, 331 (S.D.Fla.1982) (*Stanley II*).

Upon motion by the government, on November 9, 1982, the district court entered final judgment in favor of the government and vacated and withdrew that portion of its October, 1982, order which addressed Stanley's *Bivens* claim against the individual defendants. The district court held that if Stanley did not identify and serve at least one individual defendant within ninety days of its order, it would dismiss Stanley's *Bivens* claim against the "unknown" individual defendants.

On February 3, 1983, Stanley filed a second amended complaint naming the appellants as individual defendants. The district court apparently considered Stanley's second amended complaint sufficient to automatically reinstate that portion of its October, 1982, order which it had vacated.

In rejecting the argument that any *Bivens* claim which Stanley might have had against the individual defendants was precluded by *Feres*, the district court cited *Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981). The United States Supreme Court subsequently granted certiorari in *Chappell* and reversed the judgment of the court of appeals. *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). In light of the Supreme Court's opinion in *Chappell*, on October 28, 1983, the district court rendered an opinion clarifying its disposition of Stanley's *Bivens* claim against the appellants and explaining that *Chappell* did not affect that disposition. *Stanley v. United States*, 574 F.Supp. 474 (S.D.Fla. 1983), *modified*, 587 F.Supp. 1071 (S.D.Fla.1984).

The district court analyzed *Chappell* and concluded that *Chappell* did not establish a *per se* rule prohibit-

ing military personnel from maintaining suits against their superiors to recover damages for alleged constitutional violations. Since it found the facts of this case distinguishable from those in *Chappell*, the district court considered whether either of the two exceptions to a *Bivens* action would preclude this action. Finding that neither the "special factors" exception, nor the adequate alternative remedy exception were applicable in this case, the district court concluded that Stanley stated a cause of action against the individual agents and officers of the United States who participated in the LSD experiments.

Pursuant to 28 U.S.C.A. § 1292(b) (West Supp. 1985), on January 31, 1984, the district court certified its October 28, 1983, order for interlocutory appeal. By order dated April 13, 1984, we granted the appellants' motion for interlocutory appeal.

CONTENTIONS OF THE PARTIES

The appellants contend that the district court erred in holding that Stanley's *Bivens* action is not barred by *Chappell*. They argue that *Chappell* enunciated an absolute, *per se* rule that military servicemen may not bring *Bivens* actions against their superiors because such suits would necessitate inquiry into the internal structure of the military and thereby undermine discipline.

Stanley contends that *Chappell* does not state an absolute rule and that the "special factors" present in *Chappell* are not present in this case so as to negate his *Bivens* action.

The appellants also urge us to address Stanley's statutory civil rights claims on the merits, even though the district court failed to address those

claims. The appellants argue that the resolution of those issues now will promote both judicial economy and fairness because the same rationale which precludes Stanley's *Bivens* claim also precludes his statutory claims.

Stanley contends that we should not consider his statutory claims because those claims have yet to be addressed by the district court. Stanley also points out that the statutory claims are beyond the scope of this court's order allowing this interlocutory appeal.

ISSUES

We must decide whether Stanley's *Bivens* action is precluded by the Supreme Court's recent pronouncements in *Chappell* and whether to dispose of Stanley's statutory civil rights claims on the merits.

DISCUSSION

I. *Bivens Claim*

Appellants contend that Stanley's action is barred by the absolute rule enunciated in *Chappell* that military personnel cannot sue their superiors for constitutional torts.

A. *The Feres Doctrine*

The Supreme Court has articulated several different formulations of the considerations which it deems controlling in *Feres* doctrine analysis. In *Feres* itself the Supreme Court identified four factors from which it concluded that Congress had not intended to subject the government to liability for the serviceman's injuries: (1) the lack of parallel private liability; (2) the fact that because state law governs an action under the FTCA, the serviceman's right to recover

would depend upon the geographical location of the serviceman's duty station, a fortuitous circumstance over which the serviceman has no control; (3) the "distinctively federal character" of the relationship between the government and its military personnel; and (4) the absence of any provision under the FTCA for adjustment of a serviceman's recovery under the Act with any recovery which he might receive under military statutory compensation schemes. *Feres*, 340 U.S. at 141-46, 71 S.Ct. at 156-59.

Underlying these considerations was the belief that the relationship between a soldier and his superior officer is so unique and the intramilitary system of justice and administrative regulatory and remedial procedures so extensive that civilian courts should "hesitate long" before intervening to remedy any wrong allegedly done a serviceman. *Chappell*, 462 U.S. at 300, 103 S.Ct. at 2365, 76 L.Ed.2d at 591. As the Supreme Court explained in *United States v. Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 143, 99 L.Ed. 139 (1954):

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were alleged for negligent orders given or negligent acts committed in the course of military duty, led the Court [in *Feres*] to read the Act as excluding claims of that character. [Citation omitted.]

The Supreme Court has continued to recognize the distinctively federal character of the relationship between the government and members of its armed forces, and the existence of a statutory "no-fault"

compensation scheme as elements in the *Feres* analysis. *Chappell*, 462 U.S. at 299, 103 S.Ct. at 2364, 76 L.Ed.2d at 590; *Stencel Aero Engineering v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977). In *United States v. Muniz*, 374 U.S. 150, 162, 83 S.Ct. 1850, 1857, 10 L.Ed.2d 805 (1963), however, the Court acknowledged that "[i]n the last analysis, *Feres* seems best explained" by the *Brown* formulation of the doctrine. As demonstrated by the Court's emphasis in *Chappell*, the concern that civilian court inquiry might adversely affect the intramilitary disciplinary structure has emerged as the most compelling rationale for the *Feres* doctrine. *See Chappell*, 462 U.S. at 300, 304, 103 S.Ct. at 2365, 2367, 76 L.Ed.2d at 590-91, 593; *United States v. Johnson*, 749 F.2d 1530, 1535, 1538 (11th Cir.1985).

B. *The Chappell Extension of Feres*

The Supreme Court held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), that a federal official's violation of an individual's constitutional rights gives rise to a cause of action for damages, despite the absence of a federal statute specifically authorizing such constitutional tort actions. A *Bivens* cause of action may be defeated in a particular case, however, where the defendant demonstrates either that there are "special factors counselling hesitation in the absence of affirmative action by Congress," or that Congress has provided an "equally effective" alternative remedy which it explicitly declared to be a substitute for recovery directly under the constitution. *Bivens*, 403 U.S. at 396, 397, 91 S.Ct. at 2004, 2005.

In *Chappell*, the Supreme Court had occasion to consider the "special factors" that bear upon the

propriety of a *Bivens* action brought by military personnel against their superior officers. The Court concluded that those "special factors" also formed the basis of the Court's decision in *Feres*. *Chappell*, 462 U.S. at 298, 103 S.Ct. at 2364, 76 L.Ed.2d at 589-90.

The servicemen in *Chappell* were members of the United States Navy. Their duty station was a combat naval vessel. The servicemen alleged that because of their minority race, their superior officers failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed upon them penalties of unusual severity. *Chappell*, 462 U.S. at 297, 103 S.Ct. at 2364, 76 L.Ed.2d at 589. The Court concluded that the "special factors" of "the unique disciplinary structure of the military establishment and Congress's activity in the field" dictated against providing the servicemen a *Bivens* remedy against their superior officer. *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed.2d at 593.

The military establishment is founded upon a unique "hierarchical structure of discipline and obedience to command." *Chappell*, 462 U.S. at 300, 103 S.Ct. at 2365, 76 L.Ed.2d at 591. The servicemen in *Chappell* were on active duty and subject to direct orders. The Supreme Court concluded that if those servicemen were permitted to expose their superior officers to personal liability, "[t]he special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined." *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed. 2d at 593.

The Supreme Court's decision to bar the servicemen's claim was also influenced by the fact that the statutory scheme and the comprehensive internal jus-

tice system which Congress has devised to regulate military life, adequately provided for the review and remedy of the servicemen's racial discrimination complaints. *Chappell*, 462 U.S. at 302, 103 S.Ct. at 2366, 76 L.Ed.2d at 592.

The Court cautioned that it was not establishing a *per se* rule that military personnel could never seek redress in civilian courts for constitutional violations suffered in the courts of military service:

> This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.

Chappell, 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed. 2d at 593 (citation omitted).

> Civilian courts must [merely] hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers [because] that relationship is at the heart of the necessarily unique structure of the military establishment.

Chappell, 462 U.S. at 300, 103 S.Ct. at 2365, 76 L.Ed. 2d at 591.

C. *Application of Chappell*

The first "special factor" considered by *Chappell* is the "unique disciplinary structure of the military establishment." *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed.2d at 593. Unlike *Chappell*, this case does not present a situation where "[t]he special nature of military life, the need for unhesitating and

decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed.2d at 593.

Stanley was a volunteer participant in the chemical warfare program. He had been released from his regular duties to participate in this program, administered by both military and civilian personnel. Stanley was not subject to direct military orders, but was free to leave the program at any time.

Most importantly, however, Stanley ingested the LSD when he was instructed to drink a clear substance which, unbeknownst to him, contained the hazardous drug. Because he was surreptitiously administered the drug, Stanley could not possibly have challenged his "orders" to drink the clear substance. "The inescapable demands of military discipline and obedience to orders" are not implicated by the facts of this case. *Chappell*, 462 U.S. at 300, 103 S.Ct. at 2365, 76 L.E.2d at 590. There is no concern here that the "peculiar and special relationship of the soldier to his superiors" might be disrupted. *United States v. Brown*, 348 U.S. at 112, 75 S.Ct. at 143.

The other "special factor" which the Court in *Chappell* considered compelling is Congress's plenary authority over the military and its extensive activity in the field. 462 U.S. at 304, 103 S.Ct. at 2367, 76 L.Ed.2d at 593. We conclude that this factor also does not militate against permitting Stanley's *Bivens* claim. Those intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the

violations complained of here. *Chappell*, 462 U.S. at 303, 103 S.Ct. at 2367, 76 L.Ed.2d at 592-93. The Board for the Correction of Naval Records is not available to Stanley, nor can Stanley avail himself of the remedies provided under article 138 of the Uniform Code of Military Justice, 10 U.S.C.A. § 938 (West 1983). Article 138 is not available to veterans.

Neither of the "special factors" which the Supreme Court deemed dispositive in *Chappell* are present in this case. We hold, therefore, that Stanley's action is not precluded by *Chappell*. Our inquiry is not at an end, however. We must now consider whether Stanley's action is precluded under the adequate alternative remedy *Bivens* exception.[4]

Appellants argue that the Veterans Benefits Act, 38 U.S.C.A. §§ 301-362 (West 1979) (VBA), is a sufficiently adequate alternative remedy to a *Bivens* action to preclude Stanley's claim. *Bivens* requires that the appellants show that Congress explicitly declared the Veteran's Benefits Act to be a substitute for recovery directly under the Constitution and that Congress viewed the Act as equally effective as a *Bivens* action. *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005; *Carlson*, 446 U.S. at 16-19, 100 S.Ct. at 1470-1472. As the Supreme Court explained in *Carlson*,

> our inquiry at this step in the analysis is whether Congress has indicated that it intends a statu-

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[4] Because the Supreme Court in *Chappell* found that there were "special factors" which precluded the servicemen's action, it did not reach the question of whether the intramilitary remedies which it relied upon as "special factors" were sufficiently adequate alternative remedies to preclude the action under the second *Bivens* exception. A defendant in a *Bivens* action need merely establish one of the exceptions to defeat the action. *Carlson v. Green*, 446 U.S. 14, 18-19, 100 S.Ct. 1468, 1471-1472, 64 L.Ed.2d 15 (1980).

> tory remedy to replace, rather than to complement, the *Bivens* remedy. Where Congress decides to enact a statutory remedy which it views as fully adequate only in combination with the *Bivens* remedy, *e.g.*, 28 U.S.C. § 2680(h) [28 U.S.C.S. § 2680(h)], the congressional decision should be given effect by the courts.

Carlson, 446 U.S. at 19 n. 5, 100 S.Ct. at 1472 n. 5.

We do not find, nor has any other court which has addressed this issue found, any expression of congressionel intent that the VBA constitute a serviceman's exclusive remedy for injuries incurred incident to military service.

Appellants rely upon *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672-73, 97 S.Ct. 2054, 2058, 52 L.Ed.2d 665 (1977), to support their argument that the VBA is an adequate alternative remedy to a serviceman's *Bivens* action. The serviceman in *Stencel* sued the manufacturer of the egress life-support system in his fighter aircraft for the injuries he sustained when the system malfunctioned. The third-party claimant cross-claimed against the United States for indemnity. The Supreme Court considered the same factors which it considers under a claim brought directly by a serviceman to preclude the third-party claimant's indemnity claim. 431 U.S. at 670-74, 97 S. Ct. at 2057-59.

The serviceman in *Stencel* was receiving benefits under the VBA. In rejecting the third-party claimant's argument that the availability of the VBA to the serviceman barred its indemnity action for damages which it might be required to pay the serviceman, the Supreme Court concluded that the VBA serves a dual purpose. It provides a remedy for in-

jured servicemen and it clothes the government in the "protective mantle of the Act's limitation-of-liability provisions." *See Cooper Stevedoring Co. v. Kopke, Inc.*, 417 U.S. 106, 115, 94 S.Ct. 2174, 2179, 40 L.Ed. 2d 694 (1974). *Stencel* concluded, without further analysis, that "the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries. To permit [the third-party claimant's] claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans Benefits Act." *Stencel*, 431 U.S. at 673, 97 S.Ct. at 2059.

We conclude that *Stencel* is not binding precedent on the issue of whether the VBA is the exclusive remedy for servicemen injured while acting incident to military service. First, that issue was not expressly before the Court in *Stencel*. The third-party claimant in *Stencel* merely argued that "it *may* be fair to prohibit direct recovery by servicemen under the Act, since they are assured of compensation regardless of fault under the Veterans Benefits Act." *Stencel*, 431 U.S. at 672, 97 S.Ct. at 2508 (emphasis added). Moreover, as the dissent in *Stencel* noted, "the Veterans Benefits Act does not even contain an explicit declaration that it is the exclusive remedy against the Government for a serviceman's injury." *Stencel*, 431 U.S. at 675, 97 S.Ct. at 206. (Marshall, J., dissenting).

Most recently in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 202, 103 S.Ct. 1033, 1040, 74 L.Ed.2d 911 (1983), the Supreme Court acknowledged that "[w]e affirmed the dismissal of Stencel's cross-claim even though no limitation of liability statute applied to the case, because we found that the limitation of liability principle of *Feres v. United States*, 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153 (1950),

precluded Stencel's indemnity claim." Thus, as *Lockheed* explains, the *Stencel* discussion of the VBA relates only to the VBA as a *Feres* factor or a "special factor" under the first *Bivens* exceptions. The *Stencel* discussion of the VBA is not relevant to an analysis of the VBA as a sufficiently adequate alternative remedy to preclude a *Bivens* claims under the second exception to *Bivens*. We relied upon *Lockheed* in concluding in *Cole v. United States*, 755 F.2d 873, 880 (11th Cir.1985), that "[t]he VBA . . . is best regarded as an additional reason for barring a claim [under the FTCA] based on an injury which is already determined to be 'incident to service,' rather than a dispositive factor [barring the FTCA claim]." Similarly, we hold that the VBA is not a sufficiently adequate alternative to a *Bivens* action to bar Stanley's claim.

II. *FTCA Claim*

In the previous appeal, the former Fifth Circuit held that Stanley's claim against the government under the FTCA was barred under the *Feres* doctrine because "Stanley was engaged in activities incident to his military service at the time his injuries arose." *Stanley I*, 639 F.2d at 1150. *Stanley I* established the "law of the case" on Stanley's pre-discharge claim against the government under the FTCA.

Under the "law of the case" doctrine, an appellate court's findings of fact and conclusions of law are *generally* binding in all subsequent proceedings in the same case. *Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678 (11th Cir.1984). In three instances federal courts have the power to reopen issues that have been previously decided on appeal: (1) when the evidence on a subsequent trial was substantially dif-

ferent, (2) when controlling authority has since made a contrary decision of the law applicable to the issue, or (3) when the previous decision was clearly erroneous and would work a manifest injustice. *Westbrook v. Zant*, 743 F.2d 764, 768-69 (11th Cir.1984) (citing *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967)).

The second exception to the "law of the case" doctrine is applicable in this case. The former Fifth Circuit's conclusion that Stanley's FTCA action against the government was barred under the *Feres* doctrine was premised *solely* upon its finding that Stanley was acting incident to military service at the time of the incident alleged. The former Fifth Circuit did not proceed to the next level of inquiry to determine whether the considerations underlying the *Feres* doctrine militated against permitting Stanley to bring the FTCA claim. The former Fifth Circuit did not, however, have the benefit of *Johnson v. United States*, 749 F.2d 1530 (11th Cir.1985), and *Cole v. United States*, 755 F.2d 873, *reh'g denied*, 765 F.2d 1123 (11th Cir.1985).

The plaintiff in *Johnson* was the personal representative of the estate of a serviceman who was killed when his helicopter crashed into the side of a mountain. The plaintiff's complaint alleged that the negligence of civilian Federal Aviation Administration air traffic controllers was the proximate cause of the serviceman's death.

Despite the fact that *Johnson* presented an atypical *Feres* situation in that the alleged tort-feasors were civilians, we proceeded to examine the policy which pervades each of the *Feres* considerations. Our examination was to determine whether the *Feres* doctrine should be extended to preclude an action where the alleged tort-feasor is *not* a member of the armed

forces or a civilian employee engaged in activities usually associated with the armed forces. *Johnson*, 749 F.2d at 1538-39 n. 6, 1540-42 (citing *Hunt v. United States*, 636 F.2d 580, 599 n. 51, 597 (D.C. Cir. 1980)).

In *Cole v. United States*, 755 F.2d at 877 n. 11, we interpreted *Johnson* as requiring the case-by-case analysis where the facts presented are "sufficiently different from the usual *Feres*-type case." *Cole* presented the novel issue of the government's liability for a serviceman's death where the incident which gave rise to the serviceman's death occurred while the serviceman was engaged in activity incident to his military service, but the government's alleged duty to warn arose *after* the serviceman's discharge. In *Cole* it was after the discharge that the government's knowledge concerning the hazards to which the serviceman had been exposed substantially increased. We concluded that the facts in *Cole* were so novel that it was both "*necessary* and instructive" to evaluate each of the considerations underlying the *Feres* doctrine in order to properly address the plaintiffs' claim. *Cole* at 877.

Subsequent to our decision in *Cole*, we granted the government's suggestion that *Johnson* be reviewed by the en banc court. *Johnson v. United States*, 760 F.2d 244 (11th Cir. 1985). Relying on *United States v. Shearer*, —— U.S. ——, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985), also decided after *Cole*, we upheld the panel's decision and reinstated its opinion. *Johnson v. United States*, 779 F.2d 1492, 1493 (11th Cir.1985) (en banc).

Shearer involved the kidnap and murder of one serviceman by another while both were off duty and away from their bases. The decedent's mother

brought an action under the FTCA alleging that the Army knew that the murderer was dangerous and negligently failed to control or warn others about him.

Although the Court held the claims barred because they "struck at the core" of the concerns underlying *Feres*, the Chief Justice stated that:

> [t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases.

Shearer, —— U.S. at ——, 105 S.Ct. at 3043, 87 L.Ed.2d at 44.

We hold that under *Johnson*, *Cole*, and *Shearer*, this case requires the case-by-case analysis to determine whether the purpose of the *Feres* doctrine would be served by precluding Stanley's FTCA claim against the government.

Since the former Fifth Circuit's ruling in *Stanley I*, controlling authority in the Eleventh Circuit has made a contrary decision of the law applicable to the Stanley facts. Today, in the Eleventh Circuit, controlling precedent does not automatically or mechanically preclude Stanley's lawsuit under the FTCA or *Bivens* upon a finding that he suffered the complained of injury while performing duties incident to military activities. The interpretation of the *Feres* doctrine in the Eleventh Circuit is far different from the interpretation of the *Feres* doctrine in the former Fifth Circuit. As the *Feres* doctrine is presently applied in the Eleventh Circuit, Stanley may have a cause of action for injuries inflicted before his discharge. Likewise, even as *Stanley I* held, recent precedent in this circuit, *Johnson* and *Cole*, provide Stanley with the possibility of a cause of action under both the FTCA

and *Bivens* for events occurring after his discharge. Consistent with the recent analysis of the *Feres* considerations in this circuit, we hold that neither Stanley's cause of action against the government under the FTCA nor his action against the federal officials and civilians under *Bivens* is necessarily barred by the *Feres* doctrine.

On remand, the district court should allow Stanley the opportunity to amend to plead consistent with recent precedent.

III. *Statutory Civil Rights Claims*

The appellants urge us to consider Stanley's statutory civil rights claims on the merits, even though those claims have not yet been addressed by the district court. We decline to do so. Not only have those claims not been addressed by the district court, but they are also beyond the scope of the issue for which we certified this interlocutory appeal.

CONCLUSION

We affirm the district court's judgment that Stanley's complaint states a cause of action against the appellants under *Bivens* and reverse the judgment that Stanley's FTCA action against the government is barred by *Feres*.

AFFIRMED in part, REVERSED in part.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. FLORIDA, N.D.

No. 78-8141-CIV-JAG

JAMES B. STANLEY, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Oct. 28, 1983

ORDER

GONZALEZ, District Judge.

I

THIS CAUSE has come before the court for review *sua sponte* upon the issuance of the Supreme Court's opinion in *Chappell v. Wallace*, —— U.S. ——, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), and upon counsel for the plaintiff's letter to the court and the plaintiff's response to the previously filed motions to dismiss. In light of all of the foregoing, the court finds it necessary to clarify its prior opinion denying in part the defendants' motion to dismiss, *Stanley v. United States, et al.* (*Stanley II*), 549 F.Supp. 327 (S.D.Fla.1982), and the application of the Supreme Court's opinion in *Chappell* to that decision.

This case involves the secret administration of LSD to the plaintiff, a member of the United States Army, as part of an Army experiment.

In 1958, the plaintiff James Stanley was a Master Sergeant in the United States Army stationed in Fort Knox, Kentucky. Stanley volunteered to participate in a program at the Chemical Warfare Laboratories at the Army Chemical Center, Aberdeen Proving Grounds, Edgewood Arsenal, Maryland. The purpose of the program allegedly was the development and testing of methods of defense against chemical warfare attack, including the testing of various gas masks and protective clothing.

During interviews with military and civilian personnel at Edgewood Arsenal, Stanley was asked to drink a clear liquid which, unknown to him, contained lysergic acid diethylamide (LSD).[1] Stanley alleges that he suffered severe reactions, including hallucinations, as a result of ingesting the LSD. When he returned to active duty at Fort Knox a month later, he maintains that he was in an altered behavioral and emotional state.[2]

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[1] Stanley's allegation that the military surreptitiously administered LSD to him, if true, clearly demonstrates "that his constitutional rights have been violated." *Garcia v. United States*, 666 F.2d 960, 962 (5th Cir. 1982) (affirming dismissal by this court of *Bivens* action brought by drug informer against United States and individual members of marshal's service). The source of the plaintiff's *Bivens* action in the instant case is the Fifth Amendment right to be free to decide for oneself whether to submit to drug therapy. *Stanley II*, 549 F.Supp. at 331 (relying on *Mills v. Rogers*, 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982)).

[2] Stanley alleges that following the completion of the Army's LSD testing, he periodically became incoherent and subjected his family to physical abuse, often not recalling these events

Stanley continued to serve his country in the Army for eleven years, all the while completely unaware of the wrong knowingly perpetrated against him. In 1969, the Army discharged Mr. Stanley without informing him that he had ingested LSD years earlier. In December 1975, Stanley received a letter from the Department of the Army, Walter Reed Army Medical Center, soliciting his participation in a followup study of the subjects of the 1958 LSD experiments. Only then did Mr. Stanley learn that the Army had secretly administered LSD to him in 1958.

The original complaint in this case consisted of claims brought against the United States under the Federal Tort Claims Act (FTCA or the "Act"), Pub. L. No. 601, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 (U.S.C.).[3] The question of this court's jurisdiction over those claims was first raised on the defendants' motion for summary judgment. This court granted the motion for summary judgment on the basis of the doctrine announced in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). The *Feres* doctrine provides that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the

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afterwards. He further maintains that the LSD impaired his performance of military duties, prompting a reduction in his service rank. Amended Complaint ¶ 5 (filed Apr. 29, 1981). Stanley also claims that the dissolution of his marriage in 1970 was primarily due to the psychological problems that have plagued him since his encounter with LSD. *Id.* ¶ 8.

[3] The Act waived the United States Government's sovereign immunity for the torts of its employees by granting the federal district courts jurisdiction over suits for damages "caused by the negligent or wrongful act or omission of any employee of the Government." 28 U.S.C. § 1346(b) (1976).

injuries arise out of or are in the course of activity incident to service." Id. at 146, 71 S.Ct. at 159.

Upon review of that ruling, the United States Court of Appeals for the Fifth Circuit concluded that this court's application of the *Feres* doctrine to preclude the claims brought in the original complaint was correct, but that this court improperly granted the motion for summary judgment. *Stanley v. CIA (Stanley I)*, 639 F.2d 1146 (1981). Rather, the Fifth Circuit held, the proper disposition of the case was dismissal of the complaint for lack of subject matter jurisdiction. The court of appeals then remanded the case for the trial court's consideration of any amendment that the plaintiff might offer to cure the jurisdictional defect.

The plaintiff then amended his complaint[4] and, in addition to the original allegations that the defendants gave him false information regarding the program in which he participated, he also alleged that the defendants were grossly negligent in failing to debrief and inform him of the 1958 episode upon his discharge, and in failing to continue to monitor his con-

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[4] Plaintiff's original complaint named as defendants the Central Intelligence Agency, the United States Department of Defense, and the United States Army. Plaintiff later amended his complaint to name as defendants the United States Government and unknown individual federal agents and officers. Amended Complaint (filed Apr. 29, 1981). A Second Amended Complaint, filed on February 3, 1983, named as defendants several individuals who allegedly violated the plaintiff's constitutional rights during and after his service in the Army. These individuals include Joseph R. Bertino, M.D., Board of Regents of the University of Maryland, H.D. Collier, Albert Dreisbach, Bernard G. Elfert, Sidney Gottlieb, M.D., Richard Helms, Gerald Klee, M.D., Van Sim, M.D., and Walter Weintraub.

dition subsequent to his discharge. The plaintiff seeks damages for this allegedly negligent conduct.

The defendant filed a motion to dismiss the Amended Complaint, arguing, *inter alia*, that the Fifth Circuit's opinion precluded the plaintiff from alleging any claim under the FTCA and that the plaintiff could not maintain any cause of action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), because any such claim would also be barred by the FTCA, did not rise to constitutional magnitude, or would be precluded by the applicable statute of limitations.

Heeding the opinion of the Fifth Circuit in *Stanley I*, this court decided that the plaintiff could not plead a statutory (i.e. FTCA) or *Bivens*-type claim against the Government itself. But this court did hold that Mr. Stanley had a viable *Bivens* action against individual agents and officers of the United States who participated in the LSD experiment. *Stanley II*, 549 F.Supp. at 329-32.[5] It is this last conclusion that the court finds necessary to reaffirm at this time.

In concluding that the plaintiff has a viable cause of action based on *Bivens* against the individual defendants, the court rejected the defendants' argument that any *Bivens* claim also was barred by the *Feres* doctrine. *Id.* at 330. The court cited the opinion of the United States Court of Appeals for the Ninth Circuit in *Wallace v. Chappell*, 661 F.2d 729 (9th Cir.1981), in support of its theory that although a claim against the government under the FTCA may

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[5] Although the Fifth Circuit did not express an opinion on the merits of the plaintiff's amended pleadings, it did find "that Stanley has at least a colorable constitutional claim based on *Bivens* . . . ." *Stanley I*, 639 F.2d at 1159.

be barred by the *Feres* doctrine, a *Bivens* cause of action arising from the same set of facts, against individuals, is not necessarily barred by *Feres*. The Supreme Court now having reversed the Ninth Circuit in *Chappell v. Wallace*, —— U.S. ——, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), it has been suggested that the plaintiff no longer has a viable cause of action based on *Bivens*. The task before this court is to decide if *Chappell* is controlling in the instant case, and whether the exceptions to a *Bivens* action preclude the plaintiff's claims against federal officers.

II

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), established that the victim of a constitutional violation by a federal officer has the right to recover damages against the official in federal court despite the absence of any statute conferring such a right; the doctrine of sovereign immunity bars a similar action against the United States itself. *Stanley II*, 549 F.Supp. at 330 (relying on *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979)).[6] The *Bivens* cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S.

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[6] *See, e.g., Lombard v. United States*, 690 F.2d 215, 227 (D.C.Cir.1982); *Laswell v. Brown*, 683 F.2d 261, 268-69 (8th Cir.1982); *Norton v. United States*, 581 F.2d 390, 393-94 (4th Cir.), *cert. denied*, 439 U.S. 1003, 99 S.Ct. 613, 58 L.Ed.2d 678 (1978); *Duarte v. United States*, 532 F.2d 850, 852 (2d Cir.1976).

at 396, 91 S.Ct. at 2004; *see Carlson v. Green*, 446 U.S. 14, 18, 100 S.Ct. 1468, 1471, 64 L.Ed.2d 15 (1980); *Garcia v. United States*, 666 F.2d 960, 965 (5th Cir.1982). The second is when defendants prove that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective. *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005; *see Carlson*, 446 U.S. at 18, 100 S.Ct. at 1471; *Garcia*, 666 F.2d at 965.

The *Bivens* action arose out of the need to deter federal officers from violating a citizen's constitutional rights. The Supreme Court recognized that absent a constitutional remedy, complainants would have no other form of judicial relief from federal abuses. Creation of the *Bivens* action was consistent with the traditional view that "damages . . . [be] recognized as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395, 91 S.Ct. at 2004.

In *Chappell v. Wallace*, the Supreme Court reviewed the propriety of a *Bivens* action arising out of an intramilitary dispute. The Court held that "the unique disciplinary structure of the military establishment and Congress' activity in the [military] field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." —— U.S. ——, 103 S.Ct. at 2367.

This court strongly believes that the *Chappell* decision has no effect whatsoever on the plaintiff's ability to maintain a cause of action arising from the facts of the instant case. Although the court relied on *Wallace v. Chappell*, 661 F.2d 729 (9th Cir.1981), to support the reasoning in its prior ruling that Mr.

Stanley has a valid *Bivens* claim, the plaintiff's cause of action is in no way dependent upon that opinion, nor is his claim precluded by the Supreme Court's reversal of that decision. The court finds that the facts of this case are distinguishable from *Chappell*, and although the Supreme Court has now substantially limited the availability of a *Bivens* action in cases to which the *Feres* doctrine may be applicable, the Court has not totally barred *Bivens* actions by servicemen for torts committed against them during their term of service.

III

In *Chappell v. Wallace*, —— U.S. ——, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), five enlisted men serving aboard a combat naval vessel brought a *Bivens* action against their commanding officer and various other superior officers. The complaint alleged that because of their minority race, the defendants failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity. For these transgressions, the plaintiffs sought damages, declaratory judgment, and injunctive relief.

The United States District Court for the Southern District of California dismissed plaintiff's complaint, holding that the actions complained of were nonreviewable military decisions, that the naval officers were entitled to immunity, and that the enlisted men had failed to exhaust their administrative remedies.

The United States Court of Appeals for the Ninth Circuit reversed, holding that the naval practices complained of were reviewable, and that the officers in question enjoyed only qualified immunity from suit. *Wallace v. Chappell*, 661 F.2d 729 (9th Cir.

1981). The court of appeals concluded that the *Feres* doctrine does not bar a *Bivens* action and, therefore, enlisted men could bring a constitutional claim against the naval officers involved. *Id.* at 735-36 & n. 9.

The Supreme Court of the United States sided with the district court and reversed the appellate court's decision. The Court found that the *Feres* doctrine's underlying policy of protecting military discipline constituted a "special factor" that precluded a *Bivens* action. —— U.S. at ——, 103 S.Ct. at 2367. In a sweeping concluding statement, the Court held that "enlisted military personnel may not maintain a suit to recover damages from a superior for alleged constitutional violations." *Id.* at —, 103 S.Ct. at 2368. Significantly, however, the Chief Justice limited the scope of the Court's decision, declaring that "[t]his Court has never held, *nor do we now hold*, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Id.* at —, 103 S.Ct. at 2367 (emphasis added).

The obvious import of the Court's qualified holding is to limit the *Chappell* decision to its facts. Because the Supreme Court explicitly refrained from precluding all civil actions by military personnel for constitutional wrongs committed during their service, and because the Court found it necessary to determine whether there were special factors present in the facts of *Chappell* which militated against finding a *Bivens* cause of action, this court concludes that the Supreme Court's blanket statement stripping military personnel of their right to maintain an action against superior officers bars only those actions in which the same "special factors" are present, i.e.,

a case in which a member of the military brings a suit against a superior officer for wrongs which involve direct orders in the performance of military duty and the discipline and order necessary thereto.

A

The first exception to a *Bivens* action is the existence of "special factors counselling hesitation." The *Chappell* Court considered the need for military discipline to be just such a "special factor." Traditionally, courts have not interfered with intramilitary disputes because they lack the requisite competency and because such intermeddling would threaten the legitimacy of military orders. —— U.S. at ——, 103 S.Ct. at 2365-67. The Supreme Court noted the "peculiar and special relationship" of the soldier to his superiors and observed that the rights of military personnel must give way to the overriding demands of discipline and duty. *Id.* at —, 103 S.Ct. at 2365. The Court explained that this is not only true in a combat situation, but also true in the training that precedes combat, so that immediate obedience to military procedures and orders can become so ingrained that it becomes reflexive. *Id.* Thus, it comes as no surprise that the *Chappell* Court refused to allow the enlisted men to recover damages from their superior officers for alleged constitutional violations, because the acts complained of occurred during the course and performance of the plaintiffs' duties as military personnel.

This court is well aware of the compelling need to protect military discipline in order to ensure the execution of military orders. However, the plaintiff's *Bivens* action in the instant case neither involves nor threatens to compromise military discipline. The case

does not involve a combat or combat-training situation; it does not involve any exigent circumstances; and it is not a case in which the plaintiff was either ordered or obligated to participate in a military exercise. Rather, this is a case in which the Army sought volunteers to test equipment, and the plaintiff volunteered his participation, in service to his country.[7] Had civilians been eligible to participate in the program, this case could easily have involved a person not a member of the military. In sum, applying the *Chappell* Court's own standard, this is not a case involving "[t]he special nature of military life, [or]

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[7] In a prior decision in the instant case, *Stanley I*, 639 F.2d 1146 (5th Cir. 1981), the Fifth Circuit attempted to minimize the significance of Mr. Stanley's volunteer status by citing fifteen cases in which courts dismissed a serviceman's action against the Government or individuals although he was volunteering for the activity which caused his injury. This court has reviewed each of the fifteen cases cited by the Fifth Circuit in support of this holding, *id.* at 1150, and finds that they are distinguishable from the case at bar. In almost every case, the plaintiff has sued the Government under the Federal Tort Claims Act, which this court finds distinguishable from a constitutional cause of action brought against individuals pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *See infra* notes 18-26 and accompanying text. In the few cases in which the plaintiff did bring an action against individuals for violation of his constitutional rights, the actions were either based on the FTCA, *Uptegrove v. United States*, 600 F.2d 1248 (9th Cir.1979), dismissed for lack of personal jurisdiction without further analysis, *id.*, concerned with military discipline in a different context, *Schmid v. Rumsfeld*, 481 F.Supp. 19, 21 (N.D. Cal. 1979) (relying on *Bailey v. Van Buskirk*, 345 F.2d 298 (9th Cir. 1965), *cert. denied*, 383 U.S. 948, 86 S.Ct. 1205, 16 L.Ed.2d 210 (1966), or failed to consider the *Bivens* decision, *Haas v. United States*, 518 F.2d 1138 (4th Cir.1975).

the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel . . . ." —— U.S. at ——, 103 S.Ct. at 2367.

The factual posture of the instant case clearly distinguishes it from several other appellate decisions which have reached a different result. The two most notable are *Gaspard v. United States*, 544 F.Supp. 55 (E.D.La.1982), *aff'd*, 713 F.2d 1097 (5th Cir. 1983), and *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981).[8]

Gaspard and *Jaffee* are basically identical in factual design and result. In both cases, former servicemen and their wives sued the United States and various named and unnamed federal officers for violating their constitutional rights. Specifically, the plaintiffs alleged that during the Army's atomic testing in the 1950's, their superior officers knowingly *ordered* them to purposely expose themselves to atomic fallout.[9] Years later, the plaintiffs suffered a host of

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[8] The *Gaspard* and *Jaffee* decisions, as products of the Fifth and Third Circuits, respectively, are neither binding nor controlling precedent on this court or the Eleventh Circuit. *See Hill v. Linahan*, 697 F.2d 1032, 1034 (11th Cir. 1984); *United States v. Butera*, 677 F.2d 1376, 1384 n. 6 (11th Cir.1982); Baker, *Primer on Precedent*, 34 Mercer L.Rev. 1175, 1185-89 (1983). As a case of first impression, *Stanley* offers the Eleventh Circuit an opportunity to define more clearly the interplay between the *Bivens* action and the *Feres* doctrine, and to demonstrate how underlying factual variations in the *Bivens* claim produce different results.

[9] *Gaspard*, 713 F.2d at 1099 ("The troops at Desert Rock [including Mr. Gaspard] typically were ordered into open trenches shortly before each atomic blast. After the initial shock waves passed, they were ordered to march within 1,000 yards of 'ground zero.'"); *Jaffee*, 663 F.2d at 1229 (The plaintiff and others "were ordered by their commanding

medical maladies, most of which they attributed to the in-service radiation exposures. The plaintiffs' *Bivens* claims soon followed.

Both the Fifth and Third Circuits dismissed the *Bivens* actions, holding that money damages may not be assessed against the military or its officers if the suit jeopardized military discipline and if there existed an exclusive statutory remedy. Essentially, the courts found that under the specific facts alleged, the rationale of the *Feres* doctrine barred the *Bivens* clams.[10]

The result in *Gaspard* and *Jaffee* is understandable because the soldiers there "were on active duty status at the time of [the atomic testing], in uniform, *and subject to military orders and discipline.*" *Gaspard*, 713 F.2d at 1099 (emphasis added).[11] Significantly, however, the plaintiff in the instant case did not participate in the Army's testing program because a superior officer ordered him to do so; instead—to reiter-

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officers to stand in a field without benefit of any protection against radiation while a nuclear device was exploded a short distance away.")

[10] After *Chappell v. Wallace*, —— U.S. ——, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), there can be little doubt that the impact of the *Feres* doctrine on a *Bivens* action is fact-specific. Indeed, the *Gaspard* court acknowledged that "[i]t is 'crystal clear' that *Bivens* claims are distinct from FTCA actions, and the *Feres* bar therefore does not automatically preclude the *Bivens* claim." 713 F.2d at 1102 (citations and footnote omitted); *see infra* notes 18-26 and accompanying text. Only because of the nature of the facts presented in *Gaspard* did the court of appeals decide that the *Feres* doctrine barred the plaintiffs *Bivens* claims. *Id.* at 1103.

[11] In one passage, the *Gaspard* court explained that the *Feres* doctrine would bar a *Bivens* claim if the action would "obstruct *necessary* military orders." 713 F.2d at 1103 n. 12 (emphasis added).

ate—he volunteered. Unlike the soldiers in *Gaspard* and *Jaffee*, who could have left the atomic testing site only upon penalty of insubordination, Mr. Stanley could have freely withdrawn from the Army's LSD experiments. In no way, then, does the instant case require the court to inquire into the propriety of military orders. Therefore, the single most compelling reason for extending the *Feres* doctrine to *Bivens* claims against military officers, and the basis for the *Chappell* decision, is not controlling in the case at bar.

Even if military discipline was somehow tangentially affected by this court's decision, there exists ample common-law and statutory authority to support judicial review of the plaintiff Stanley's constitutional claim. First, complaints by military personnel, which are encouraged by the Uniform Code of Military Justice, 10 U.S.C.A. § 938 (1975),[12] are judicially reviewable.[13] Second, military officials have tradition-

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[12] Article 138, 10 U.S.C.A. § 938, provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.

[13] *Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973) (court stayed officer's discharge and granted mandamus relief to afford him review of his low efficiency report); *Smith v. Resor*, 406 F.2d 141, 145 (2d Cir.1969) ("Our reluctance . . . to review discretionary military orders does not imply that any action by the Army, even one violative of its own regulations, is beyond the reach of the courts."); *Cushing v. Tetter*, 478 F.Supp. 960 (D.R.I.1979) (naval enlistee properly failed to resort to remedies under Uniform Code of Military Justice before seeking federal judicial relief from order that he return to military unit); *Hickey v. Commandant of Fourth Naval Dist.*, 461 F.Supp. 1085 (E.D.Pa.1978) (naval reservist en-

ally been held accountable in courts of law,[14] and this practice continues today.[15] Third, military officers are

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titled to judicial review of Secretary's order calling reservist to active duty upon his disenrollment from Naval ROTC).

Judicial decisions over the last quarter century demonstrate that there is no broad barrier to judicial review of military matters. For example, the federal courts have greatly expanded their review of military court-martial proceedings. *See Schlesinger v. Councilman*, 420 U.S. 738, 745, 95 S.Ct. 1300, 1306, 43 L.Ed.2d 591 (1975); *Harmon v. Brucker*, 355 U.S. 579, 582, 78 S.Ct. 433, 435, 2 L.Ed.2d 503 (1958); *Scott v. Schlesinger*, 498 F.2d 1093 (5th Cir.1974); *Gibbs v. Blackwell*, 354 F.2d 469 (5th Cir.1965). The courts also have reviewed the military's decision to grant or deny inductees conscientious objector status. *See United States ex rel. Donham v. Resor*, 436 F.2d 751 (2d Cir.1971); *United States ex rel. Martinez v. Laird*, 327 F.Supp. 711 (N.D.Fla.1971). Most significantly, federal courts are not adverse to reviewing internal military affairs, *see Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958) (dicharge); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir.1971) (demotion), or examining the constitutionality of military decisions or regulations, *see Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (freedom of speech); *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953) (due process); *Hatheway v. Secretary of Army*, 641 F.2d 1376 (10th Cir.), *cert. denied*, 454 U.S. 864, 102 S.Ct. 324, 70 L.Ed.2d 164 (1981) (due process and equal protection); *Priest v. Secretary of Navy*, 570 F.2d 1013 (D.C. Cir.1977) (freedom of speech); *Betonie v. Sizemore*, 496 F.2d 1001 (5th Cir.1974) (right to counsel); *United States v. Flower*, 452 F.2d 80 (5th Cir.1971) (freedom of speech).

[14] *See Dinsman v. Wilkes*, 53 U.S. (12 How.) 389, 13 L.Ed. 1036 (1851) (marine can sue his commanding officer for alleged unconstitutional cruel and unusual punishment); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 2 L.Ed. 243 (1804) (commander of U.S. warship liable for damages for unlawful seizure of neutral vessel even though acting on order of President).

[15] *See Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (habeas corpus review of court martial);

subject to only qualified immunity,[16] albeit this immunity is granted if military discipline would be deleteriously affected by judicial interference. *See Chappell*, —— U.S. at ——, 103 S.Ct. at 2365-66.

In conclusion, by donning a uniform, a member of the Army does not volunteer himself to be duped and deceived into becoming a guinea pig for his superiors, and consequently to be deprived of his most fundamental constitutional and human rights. The "peculiar and special relationship of the soldier to his superiors" does not permit the violation of those fundamental rights in a situation that does not involve military discipline and duty. Furthermore, although the special status of the military has required the establishment of two systems of justice, one for civilians and the other for military personnel, both must operate within the confines of the Constitution and the Bill of Rights. As explained in *Thornwell v. United*

Parisi v. Davidson, 405 U.S. 34, 92 S.Ct. 815, 31 L.Ed.2d 17 (1972) (serviceman who had applied for discharge as conscientious objector and had exhausted administrative remedies was entitled to seek habeas corpus relief in federal court); *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969) (review and reversal of lower courts denial of habeas corpus relief for soldier charged with nonservice connected wrongdoing); see cases cited *supra* note 13.

[16] *See Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (Governor, *senior and subordinate officers of state National Guard*, and state university president not absolutely immune from suit for damages under 42 U.S.C. § 1983 for military steps taken in alleged suppression of student dissent over Vietnam War); *Thornwell v. United States*, 471 F.Supp. 344 (D.D.C.1979) (high ranking military officials who were charged with violating serviceman's fifth amendment rights held not immune from suit); *infra* note 26 and accompanying text.

States, 471 F.Supp. 344 (D.D.C.1979), a case almost identical to the one at bar: [17]

> To hold that the military may deprive a civilian of his constitutional rights merely because the deprivation originated when the civilian was an enlisted man would be tantamount to declaring all veterans second class citizens. Men and women who have served in our Armed Forces, and to whom this nation is indebted beyond measurement, are certainly entitled to the constitutional liberties afforded all citizens. In short, if the military deprives a veteran of his constitutional rights, it may not look to *Feres* for immunity.

Id. at 353 (footnote omitted).

B

The *Chappell* Court, by its own admission,[18] relies on the *Feres* doctrine policy of protecting military discipline to bar a *Bivens* action. Although a small portion of the opinion intimates that the Court is sensitive to the difference between a statutory and a con-

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[17] Plaintiff Thornwell was a former serviceman who sued the United States and his former military superiors for injuries which he sustained after the Army intentionally administered LSD to him without his knowledge as part of their interrogation. The plaintiff charged, *inter alia*, that the federal officers violated his fifth amendment due process rights by concealing the drugging and failing to provide him with follow-up medical treatment. As to this count, the United States District Court for the District of Columbia held that the plaintiff's allegations stated a valid *Bivens*-type cause of action. 471 F.Supp. at 355.

[18] ". . . the Court's analysis in *Feres* guides our analysis of this case." —— U.S. at ——, 103 S.Ct. at 2365.

stitutional cause of action,[19] the decision's overall analysis appears to belie this view. Statutory and constitutional actions implicate different immunity concepts, which can sharply alter the complexion of a court's analysis. A *Bivens* claim raises questions about official immunity, while the principle of sovereign immunity often dictates the result of actions brought under the Federal Tort Claims Act. This court does not interpret *Chappell* as holding that the law and policy circumscribing statutory actions are controlling herein. Rather, the FTCA, and more specifically the *Feres* doctrine, merely influence this court's analysis of plaintiff's constitutional claim. To ensure that its position on this important point is clear, the court pauses at this juncture to examine the relationship between the *Feres* doctrine and the *Bivens* cause of action.

The *Feres* doctrine represents a judicial response to Congress' passage of the FTCA. The doctrine prevents members of the armed forces from suing the United States for injuries suffered incident to, or arising out of, military service. There *Feres* Court cited several reasons for the doctrine, some of which remain persuasive today. First, the "distinctively federal" nature of the relationship between soldiers and the government means that military personnel should not be subject to variations in state law when seeking relief.[20] Second, claims against the government are unnecessary because there already exists a comprehensive system for compensating military

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[19] "[*Chappell*] concerns the limitations on the type of non-statutory damage recognized in *Bivens*, rather than Congress' intent in enacting the Federal Tort Claims Act . . ." *Id.*

[20] *Feres*, 340 U.S. at 143, 71 S.Ct. at 158.

personnel under the Veterans Benefits Act, 38 U.S.C. § 301 et seq. (1976).[21] Third, suits against the government are barred because of the need for military discipline, which is fostered by preventing a soldier from questioning the legitimacy and propriety of an order.[22]

Completely distinguishable from a statutory action against the military barred by *Feres* is a constitutional cause of action based on *Bivens*. The source of a *Bivens* action is the Constitution; the rights protected therein are among the most valued personal liberties that citizens possess. Indeed, the Supreme Court has long recognized that a citizen has a right to relief when his constitutional rights are violated. As Chief Justice John Marshall observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), "[t]he very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws." The *Bivens* Court logically extended this principle to include a citizen's right to sue federal officers for alleged violations of the former's constitutional rights. 403 U.S. at 397, 91 S.Ct. at 2005. The federal courts have the power to award damages to a litigant in a *Bivens* claim absent con-

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[21] 340 U.S. at 145, 71 S.Ct. at 159. *But cf. United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954). In *Brown*, the Court found that the availability of relief under the Veterans Act, ch. 102, § 31, 48 Stat. 526 (1934) (current version at 38 U.S.C.A. § 351 (1979)), did not preclude recovery against the Government under the FTCA, too. 348 U.S. at 114, 75 S.St. at 144 (reaffirming *Brooks v. United States*, 337 U.S. 49, 53, 69 S.Ct. 918, 920, 93 L.Ed. 1200 (1949)).

[22] *See, e.g., Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673, 97 S.Ct. 2054, 2058-59, 52 L.Ed.2d 665 (1977).

gressional authorization,[23] and such actions can be implied under the Fifth Amendment.[24]

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[23] *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005. The plain and obvious language of post-*Bivens* Supreme Court decisions easily dispenses with the *Chappell* Court's undocumented assertion that federal courts lack the authority to provide damage remedies for constitutional violations in the absence of congressional approval. —— U.S. at ——, 103 S.Ct. at 2367. For example, in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), a case involving the scope of immunity afforded federal executive officers, Justice White counselled:

> The presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution. . . . Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim.
>
> But once this analysis is completed, there is no reason to return again to the absence of congressional authorization in resolving the question of immunity.

Id. at 503, 98 S.Ct. at 2909 (citations omitted). Lest there be any doubt that the federal courts can authorize a *Bivens* remedy when faced with congressional silence, the court urges review of Justice Harlan's concurrence in *Bivens*, 403 U.S. at 398, 91 S.Ct. at 2005; *see James v. United States*, 358 F.Supp. 1381, 1386-87 (D.R.I.1973).

[24] *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (action against congressman for sex discrimination); *Thornwell v. United States*, 471 F.Supp. 344, 353-55 (D.D.C.1979) (military surreptitiously administered LSD to soldier in violation of his fifth amendment rights); *see also Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (eighth amendment).

In *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 I Ed.2d 15 (1980), which involved a claim by a mother on behalf of her deceased son against federal prison officials who were alleged to have intentionally deprived him of necessary medical care, the Supreme Court recognized another important difference between the *Bivens* and FTCA actions: the constitutional remedy is more effective. The Court adduced four reasons for this conclusion:

> First, the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States.
>
> . . . . .
>
> Second, our decisions . . . indicate that punitive damages may be awarded in a *Bivens* suit. . . . But punitive damages in an FTCA suit are statutorily prohibited. 28 U.S.C. § 2674. Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts.
>
> Third, a plaintiff cannot opt for a jury in an FTCA action, 28 U.S.C. § 2402, as he may in a *Bivens* suit. . . .
>
> Fourth, an action under FTCA exists only if the state in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U.S.C. § 1346(b). Yet it is obvious that the liability of federal officials for violations of citizen's constitutional rights should be governed by uniform rules.

Carlson, 446 U.S. at 21-23, 100 S.Ct. at 1472-74. Rather than allow federal officials to act beyond the scope of their authority with impunity, the *Bivens*

action checks the exercise of that power and serves as "an important means of vindicating constitutional guarantees." *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978).[25] Because of these differences, the *Bivens* and FTCA actions are distinguishable.

Extending the *Feres* analysis to a *Bivens* claim blurs the distinction between statutory and constitutional actions. Without delineating between the two,

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[25] Courts critical of the *Bivens* remedy charge that the deterrent value of the action has a "chilling effect" on the exercise of discretionary power by government officials and, therefore, the constitutional action hinders not only improper conduct, but proper conduct, too. *See Jaffee v. United States*, 663 F.2d 1226, 1234 (3d Cir. 1981). Although this criticism has merit in a military setting in which orders must be obeyed reflexively, it has no application where, as here, military discipline is not involved. Instead, the instant case presents a rather straight-forward question of whether fundamental constitutional rights take precedence over government discretionary power. This court answers in the affirmative.

Admittedly, in order for government to function properly, its officials must be free to exercise discretionary authority. However, the Framers of the Constitution recognized that discretionary authority left uncontrolled can become oppressive, so they drafted the Bill of Rights to check government power and protect individual liberties. L. Tribe, American Constitutional Law § 1-2, at 3 n. 7 (1978) (relying on 14 The Papers of Thomas Jefferson 659 (J. Boyd ed. 1958)). The presumption born of the first ten amendments is that government conduct violative of an individual's constitutionally-protected rights is invalid. Translated into practical terms, this means that in a military setting in which discipline is not relevant, government officers cannot secretly administer drugs to members of the armed forces in violation of their constitutional rights. If the *Bivens* action has a "chilling effect" on this type of individual conduct, then so be it. After all, no less an authority than the Bill of Rights requires such a result.

a court might grant *official* immunity to officers in the military based on reasoning that heretofore has sustained only federal *sovereign* immunity. While sovereign immunity has constitutional underpinnings and is as absolute as Congress may intend, official immunity is judge-made and generally is qualified.[28]

In order to avoid obscuring the concepts of sovereign and official immunity, *Chappell* counsels that the *Feres* doctrine "guides," but does not dictate, the outcome of a *Bivens* action arising out of an intra-military dispute. The Court reasons that if the *Feres* doctrine applies, then military officers may be subject to qualified immunity from suit. As explained above, however, the *Feres* doctrine is not controlling in the instant case because the discipline of military subordinates is in no way implicated by the facts. Thus, in holding that the plaintiff's *Bivens* action is viable, this court is faithful to the rule in *Chappell* while remaining sensitive to the distinction between a statutory and a constitutional cause of action.

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[28] Virtually every federal or state officer is subject to qualified immunity. *See Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (Secretary and Assistant Secretary of Agriculture); *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) (state non-judicial officials); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (governor and officers in National Guard). Although qualified immunity is the rule, the Supreme Court has recognized that there are some officials whose special functions require a full exemption from liability. *See Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (state prosecutor); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) (state judge); *Yaselli v. Goff*, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927), *aff'g* 12 F.2d 396 (2d Cir.1926) (federal prosecutor); *Bradley v. Fisher*, 13 Wall 335, 20 L.Ed. 646 (1872) (federal judge).

C

Under the *Bivens* analysis, the implication of a constitutional cause of action also may be precluded when Congress has explicitly provided an adequate alternative remedy. The *Chappell* Court devotes little space to this issue; in fact, nowhere in the opinion does the Court even mention this second exception to a *Bivens* action. The Court does point out, however, that military personnel can bring their complaints before a military tribunal, and that such bodies can award retroactive back pay and promotions. *Chappell*, —— U.S. at ——, 103 S.Ct. at 2367.

Such remedies are meaningless in the instant case. The constitutional wrong complained of by Mr. Stanley is impossible to correct. The plaintiff does not claim that the Army cheated him out of either money or a promotion. Rather, he alleges that the Army has knowingly deprived him of the ability to appreciate and enjoy his life; that for the past twenty-five years, he has suffered—and continues to suffer—from serious mental illness and severe physical pain. Amended Complaint ¶¶ 5, 8 (filed Apr. 29, 1981).

Having differentiated between the alternative remedies available in *Chappell* and the instant case, the court would be content to stop here. However, the need for clarity in this case compels the court to explain in greater detail why no alternative remedies exist that would preclude the plaintiff's *Bivens* action.

There are two, mutually dependent, elements to the alternative remedy exception. The first element requires proof that Congress has provided an alternative remedy which it *explicitly* declared to be a substitute for recovery under the Constitution. *Bivens*,

403 U.S. at 397, 91 S.Ct. at 2005; *see Carlson v. Green*, 446 U.S. 14, 19-20, 100 S.Ct. 1468, 1472, 64 L.Ed.2d 15 (1980); *Davis v. Passman*, 442 U.S. 228, 246-47, 99 S.Ct. 2264, 2278, 60 L.Ed.2d 846 (1979). An essential aspect of this element is that Congress must expressly intend for the alternative remedy to replace, rather than to complement, the *Bivens* remedy. *Carlson*, 446 U.S. at 19 n. 5, 100 S.Ct. at 1472 n. 5. The second independent requirement for this exception to apply is that the remedial scheme must be *equally as effective* as the damages action. *Id.* at 18-19, 100 S.Ct. at 1471-72.

The only alternative remedy that satisfies the element of the exception is the Veterans Benefits Act, 38 U.S.C. § 301 et seq. (1976) ("VBA"). Although the Third and Fifth Circuits have concluded that the VBA preempts a private action against the military for damages based on the Constitution, *see Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983); *Jaffee v. United States*, 663 F.2d 1226, 1245-46 (3d Cir. 1981), neither of these decisions applied the *Bivens/Carlson* analysis.

The *Jaffee* court fundamentally modified the alternative remedy test by not requiring "an explicit Congressional declaration of the exclusivity of veterans' compensation." 663 F.2d at 1243. In *Gaspard*, the court ignored the *Bivens/Carlson* standard altogether. While the Fifth Circuit found the VBA to be an "exclusive" and "comprehensive" remedy, 713 F.2d at 1102, 1105, no consideration was given, as *Carlson* requires, to whether the statutory claim is "as effective" a remedy as the *Bivens* action itself. Moreover, the *Gaspard* court did not find, as *Bivens* requires, that Congress had "explicitly declared" the VBA to

be an exclusive remedy.[27] This court is not prepared to alter so radically the standard established in *Bivens* and reaffirmed in *Carlson*, especially since the *Chappell* Court was presented with the issue and basically elected to ignore it.[28]

Admittedly, the legislative history of the VBA indicates that Congress has assumed some responsibility for insuring adequate compensation for service-related injuries, S.Rep. No. 94-1226, 94th Cong., 2d Sess. 10, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2537, 2541. Yet nowhere in the legislative history or the statutory language of the VBA itself does the Congress "explicitly declare" that the VBA is to replace a money damages action.[29] This is particu-

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[27] The Fifth Circuit has not hesitated to apply the "explicit declaration" standard in the past. For example, in *Garcia v. United States*, 666 F.2d 960 (5th Cir.1982), the court observed that "a *Bivens* action may . . . be defeated . . . when defendants show that Congress has provided an equally effective alternative remedy which it *explicitly* declared to be a substitute for recovery directly under the Constitution." *Id.* at 965 (emphasis added).

[28] In a case decided the same day as *Chappell*, *Bush v. Lucas*, —— U.S. ——, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), the Supreme Court was confronted with a *Bivens* claim brought by a federal civilian employee against his supervisor. Unlike *Chappell*, the *Lucas* Court reviewed the *Bivens/Carlson* test and, significantly, left the "explicit declaration" standard intact. —— U.S. at ——, 103 S.Ct. at 2411.

[29] *Lucas* provides an insight into the type of legislative history and statutory language that is necessary to warrant a finding that a congressionally-imposed remedial scheme is to be an exclusive remedy. The issue before the Court in *Lucas* was what legal remedies are available to a government civil servant who is the victim of a retaliatory demotion or discharge because he has exercised his first amendment rights. The Court posited that for a congressional remedy to be the sole source of relief, the Congress must so indicate "by statu-

larly significant because Congress follows the practice of expressly stating when it intends to make a legislative remedy exclusive. *See* 10 U.S.C.A. § 1089(a) (1983); 38 U.S.C.A. § 4116(a) (1979); 42 U.S.C.A. § 233(a) (1982); 42 U.S.C.A. § 2458a (West Supp. 1983).[20] None of the decisions which have found the VBA to be an exclusive remedy for servicemen seeking compensation for injuries sustained while in the military have reconciled their result with this congressional practice. *See Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464, 100 S.Ct. 647, 650, 62 L.Ed.2d 614 (1980) (relying on *Stencel Aero Engineering Co. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977)); *Gaspard v.*

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tory language, by clear legislative history, or perhaps even by the statutory remedy itself. . . ." —— U.S. at ——, 103 S.Ct. at 2411. In light of the "elaborate remedial system" enacted by Congress to handle challenges to agency personnel decisions, *id.* 103 S.Ct. at 2416, the Court concluded that Congress, and not the federal courts, is better equipped to prescribe the scope of relief that is made available to federal employees whose constitutional rights have been violated by their supervisors. Pursuant to the guidelines announced in *Lucas*, this court has reviewed the legislative history and statutory language of the VBA, and finds that neither clearly indicates that Congress intended for the compensation scheme therein to be an exclusive remedy. At most, Congress intended for the VBA "to provide relief for the impaired earning capacity of veterans disabled as a result of their military service," S.Rep. No. 94-1226, 94th Cong., 2d Sess. 39, *reprinted in* 1976 U.S.Code Cong. & Ad.News 2537, 2565, leaving it to the courts to fashion a remedy that would encourage individual accountability.

[20] In each of the legislative sections cited, the Congress has declared that the remedies therein "shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter. . . ."

United States, 713 F.2d 1097 (5th Cir. 1983); *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 1772, 76 L.Ed.2d 344 (1983); *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981); *Carter v. City of Cheyenne*, 649 F.2d 827 (10th Cir. 1981). But *see supra* note 21. Furthermore, cases such as *Stencel*, *Scales*, and *Carter* are distinguishable from the instant case because they involved statutory actions against the Government, and not constitutional actions against federal officers.

In a statutory claim against the Government, the legislature has created the action and, appropriately enough, delineates the available remedies. The remedies are declared exclusive as the necessary tradeoff for making the sovereign liable for wrongdoing. Thus, an injured serviceman suing the Government under the FTCA is assured a "swift, efficient remedy," and the Government itself basically remains protected from unlimited liability by the Act's limitation-of-liability provisions. *Stencel*, 431 U.S. at 673, 97 S.Ct. at 2058 (quoting *Cooper Stevedoring Co. v. Kopke, Inc.*, 417 U.S. 106, 115, 94 S.Ct. 2174, 2179, 40 L.Ed.2d 694 (1974)).

Legislative relief is neither an exclusive nor an adequate means of compensating a person whose constitutional rights were violated by federal officers. To begin with, a *Bivens* action does not threaten to expose the Government to broad liability because a federal officer, and not the Government, is the party charged with wrongdoing. Additionally, the *Bivens* cause of action seeks to hold a federal officer accountable for his actions, *supra* pp. 483-484, while the statutory action in *Stencel* and similar cases is designed to insure "simple, certain, and uniform compensation." *Jaffee v. United States*, 663 F.2d 1226,

1232 (3d Cir. 1981) (interpreting the VBA and quoting from *Feres*). In fact, the Supreme Court has recognized that the VBA is nothing more than a no-fault compensation scheme that substitutes for tort liability. *Stencel*, 431 U.S. at 672, 97 S.Ct. at 2058; *see Lombard v. United States*, 690 F.2d 215, 219 (D.C. Cir. 1982). In short, the VBA should be viewed as fully adequate only in combination with the *Bivens* remedy.

Other reasons suggest that the VBA does not pass judicial scrutiny under the *Bivens/Carlson* standard. Initially, even after passage of the VBA, money damages could still be recovered under state tort law for intentional and negligent torts. If the VBA was to be meant as an exclusive remedy, then why did not Congress close this legal loophole? Furthermore, given the plethora of suits involving servicemen seeking judicial review of their intramilitary disputes,[81] why has Congress neither clarified the status of nor

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[81] Examples include suits over atomic testing, *see Jaffee v. United States*, 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979); *Gaspard v. United States*, 544 F.Supp. 55 (E.D.La.1982), *aff'd*, 713 F.2d 1097 (5th Cir.1983), and the Army's spraying of the herbicide Agent Orange in Vietnam, *see In re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 762 (E.D.N.Y.), *rev'd*, 635 F.2d 987 (2d Cir.1980), *cert. denied sub nom., Chapman v. Dow Chemical Co.*, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981). One article surveying the subject area reports that "[p]resently, there are more than one thousand pending lawsuits alleging constitutional violations." Madden, Allard, & Remes, *Bedtime for* Bivens: *Substituting the United States as Defendant in Constitutional Tort Suits*, 20 Harv.J. on Legis. 469, 473 (1983) (footnote omitted) [hereinafter cited as *Bedtime for* Bivens].

expressly barred money damages claims when confronted with this issue? [32]

Even if the VBA is deemed to be an alternative remedy which Congress has explicitly declared to be a substitute for recovery under the Constitution, this court finds that it is not "an *equally* effective remedial scheme." *Carlson*, 446 U.S. at 22 n. 10, 100 S.Ct. 1468 n. 10. An alternative remedy, to be equally effective in this case, must accomplish two objectives: it must make the complainant whole and deter future such abuses of power.[33] The court remains uncertain whether the Veterans Administration's (VA) system of benefits is equipped to satisfy the plaintiff's demand for relief. Additionally, shifting the responsibility for compensating Mr. Stanley from the federal officers involved to the VA has little deterrent value to the individuals, and all but declares that military officers can violate the most basic of our constitutional rights with impunity.

IV

After lengthy analysis, the court concludes that the Supreme Court's decision in *Chappell v. Wallace*, —— U.S. ——, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), is inapposite, and that the plaintiff has a viable *Bivens*-type cause of action against individual agents and

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[32] If Congress wanted to make veterans' benefits an exclusive remedy, then it could so state in at least one annual appropriation bill that funds the VBA. Like its predecessors, the Ninety-eighth Congress has taken up the question of whether sovereign immunity should bar a constitutional tort claim against military officials. And, like its precedessors, final, if any, action on the proposed bills will not occur during this session. For an account of this legislative activity, see *Bedtime for* Bivens, *supra* note 31 at 475-77.

[33] *See id.* at 475 & n. 19.

officers of the United States who participated in the LSD experiments.

By way of review, the overbroad statements in *Chappell* must be read in the context of the facts and analysis of the opinion. A careful examination of *Chappell* proves that, at most, the Supreme Court has decided to bar *Bivens* actions brought by servicemen against their superiors if the alleged wrongdoing occurred during active duty and was incident to the execution of military orders. Couched in these terms, the holding in the case at bar displays the proper deference to *Chappell*, yet preserves the sworn duty of this court to be heard when the Government's egregious behavior violates the law by victimizing the very people that it asks to defend it.

Constitutional law scholar Archibald Cox has written that for the law to have true authority and precedential value, it must "meet the needs of men and match their ethical sensibilities." A. Cox, The Role of the Supreme Court in American Government 110 (1976). As has been demonstrated, any decision by this court strictly and literally applying the holding of *Chappell* to the instant case, of necessity, would crumble under the weight of legal and moral scrutiny. This court has seen few cases which more desperately cry out for and demand judicial redress. The acts alleged to have been committed by the officers and agents named as defendants in this case are insidious to the most fundamental rights protected by our Constitution: the right of an individual to control his mind, his private thoughts, and his bodily integrity. To deny Mr. Stanley a judicial forum is to strip the court of its most important function—to ensure that the plaintiff is accorded justice under the law.

This court reiterates the words of Chief Justice Earl Warren, as quoted in the *Chappell* decision: "'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.'" —— U.S. at ——, 103 S.Ct. at 2367 (citing Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962)). Accordingly, this court, having found that the special factors existing in *Chappell* are not applicable to this case, and that no special factors exist dictating against a *Bivens*-type action, refuses to conclude that the *Chappell* decision precludes a *Bivens*-type cause of action by the plaintiff Stanley.

The prior order herein denying in part the defendants' motion to dismiss is hereby ratified and confirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. FLORIDA

No. 78-8141 CIV-GONZALEZ

JAMES B. STANLEY, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Aug. 3, 1984

ORDER OF CLARIFICATION

GONZALEZ, District Judge.

THIS CAUSE has come before the Court for review *sua sponte* upon examination of its order entered October 28, 1983 and cited at 574 F.Supp. 474 (S.D.Fla.1983). By this order, the Court seeks to correct two scrivener's errors in the text of the opinion. It shall be

ORDERED AND ADJUDGED that:

1. At 574 F.Supp. at 483, col. 1, line 8 (slip op. page 14, line 8) the word "There" be changed to "The".

2. At 574 F.Supp. at 485, col. 2, line 25 (slip op. page 18, line 16) the word "independent" be changed to "dependent".

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APPENDIX D

UNITED STATES DISTRICT COURT
S.D. FLORIDA, N.D.

Civ. A. No. 78-8141-CIV-JAG

JAMES B. STANLEY, PLAINTIFF

v.

CENTRAL INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES ARMY, UNITED STATES OF AMERICA, UNKNOWN INDIVIDUAL FEDERAL AGENTS AND OFFICERS, DEFENDANTS

Nov. 9, 1982

ORDER

GONZALEZ, District Judge.

This matter having been opened to the Court by the United States' Motion For Partial Final Judgment and Suggestion Of Interest.

And the Court having considered the United States' Motion for Partial Final Judgment and Suggestion Of Interest, and further, having reviewed the United States' previously-filed Motion to Dismiss or in the Alternative for Summary Judgment and Plaintiff's Opposition thereto, and further, having reconsidered

this Court's Order of October 15, 1982, 549 F.Supp. 327,

And the Court having found and determined that the United States' Motion For Partial Final Judgment and Suggestion Of Interest are well taken,

IT IS on this 9th day of November, 1982, ORDERED:

That there is no just reason for delay in expressly directing the entry of judgment in favor of the United States and that such relief is HEREBY GRANTED and it is

FURTHER ORDERED that the clerk enter final judgment in favor of the United States forthwith, and it is

FURTHER ORDERED that this Court's October 15, 1982 Order ruling on plaintiff's claims against individual defendants is hereby vacated and withdrawn; and it is

FURTHER ORDERED that unless plaintiff identifies and serves at least one individual defendant by his correct name within ninety (90) days, claims against individual defendants shall be dismissed on the Court's own motion.

APPENDIX E

UNITED STATES DISTRICT COURT
S.D. FLORIDA, N.D.

No. 78-8141-CIV-JAG.

JAMES B. STANLEY, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Oct. 15, 1982

Opinion Vacated Nov. 9, 1982
See 552 F.Supp. 619

ORDER

GONZALEZ, District Judge.

THIS CAUSE has come before the Court upon the Defendants' Motion to Dismiss or in the alternative Motion for Summary Judgment. The Court has considered the motion, and has heard extensive oral argument by counsel.

The case involves the secret administration of LSD to members of the U.S. Army as part of an Army experiment.

In 1958 plaintiff was a Master Sergeant in the United States Army stationed at Fort Knox, Kentucky. Plaintiff volunteered to participate in a program at the Chemical Warfare Laboratories at the Army Chemical Center, Aberdeen Proving Grounds, Edgewood Arsenal, Maryland. The purpose of the program allegedly was the development and testing of methods of defense against chemical warfare attack, including the testing of various gas masks and protective clothing.

During interviews with military and civilian personnel at Edgewood Arsenal, plaintiff was asked to drink a clear liquid which, unknown to him, contained lysergic acid diethylamide (LSD). Plaintiff unknowingly ingested this drug on four separate occasions. Plaintiff alleges that as a result he experienced severe reactions including hallucination. When he returned to active duty at Fort Knox a month later he maintains he was in an altered behavioral and emotional state.

Plaintiff was discharged from the Army in 1969 still unaware that he had ingested LSD years earlier. In December, 1975, he received a letter from the Department of the Army, Walter Reed Army Medical Center, soliciting his participation in a followup study of the subjects of the 1958 LSD experiments. It was then that he first became aware that he had secretly been given LSD in 1958 by Army personnel.

In his Amended Complaint, plaintiff alleges that the defendants deliberately gave him false information regarding the true nature of the program he volunteered to participate in. He further alleges that the Defendants were grossly negligent in failing to debrief and inform him of the 1958 episode upon his discharge, and in failing to continue to monitor his

condition subsequent to his discharge. Plaintiff seeks damages for this allegedly negligent conduct.

The original complaint in this case was based on the same set of facts and consisted of claims brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 (b) and 2671, *et seq.* The question of this court's jurisdiction over those claims was first raised on a motion for summary judgment. This court granted said motions on the basis of the doctrine announced in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). The *Feres* doctrine provides that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159.

Upon review of that ruling, the Fifth Circuit concluded that this court's application of the *Feres* doctrine to preclude the claims brought in the original complaint was correct, but that this court improperly granted the motion for summary judgment. *Stanley v. CIA*, 639 F.2d 1146 (1981). Rather, the Fifth Circuit held that the proper disposition of the case was dismissal of the complaint for lack of subject matter jurisdiction. The Fifth Circuit then remanded the case for the trial court's consideration of any amendment that the plaintiff might offer to cure the jurisdictional defect. *Id.* at 1159-60.

The first question now presented upon the Defendant's Motion to Dismiss the Amended Complaint is whether Plaintiff's Amended Complaint states a cause of action under the Federal Tort Claims Act (FTCA) *not* barred by the *Feres* doctrine.

The defendant argues that the Fifth Circuit, in *Stanley*, precluded any question of whether Stanley could allege a cause of action under the FTCA.

Although the court finds that the Fifth Circuit left the door open to Stanley to amend his complaint to allege facts sufficient to support a post-discharge tort theory, (so his claims could fall outside the *Feres* doctrine pursuant to *Thornwell v. United States*) the Court finds that the plaintiff has failed to allege a distinct tort arising entirely post-discharge. *See Thornwell v. United States*, 471 F.Supp. 344 (D.D.C. 1979). (*Feres* doctrine does not bar claims arising from conduct occurring entirely post-discharge).

The court reaches this conclusion by examining the reasoning of the Fifth Circuit and its reliance on *Schnurman v. United States*, 490 F.Supp. 429 (E.D. Va.1980). *Stanley*, 639 F.2d at 1155.

In *Schnurman*, the plaintiff suffered injuries as a result of his exposure to toxic mustard gases during a United States Navy experiment in which he participated while an apprentice seaman. The *Schnurman* court granted the defendant's renewed motion to dismiss at the end of the trial finding (a) that the plaintiff's injuries were not shown to be caused in any way by the Government's failure to treat plaintiff subsequent to discharge; or (b) by the Government's failure to warn him of the true nature of the gas to which he had been exposed. There was no testimony that his injuries were in any way aggravated or multiplied by the Government's alleged post-discharge negligence, or that follow-up treatment could have avoided any long-term effects of the exposure. *Schnurman*, 490 F.Supp. at 437. The *Schnurman* court found no evidence of any causal connection between the plaintiff's injury and the Government's alleged *post-discharge* negligence, and held that to allow recovery for the defendants' failure to monitor and

treat injuries which resulted from an *in-service* tort (for which there is no recovery) would leave very little of *Feres* immunity. *Id.*

Plaintiff Stanley's Amended Complaint alleges that "Upon and subsequent to Plaintiff's discharge from the army in 1969 Defendants were grossly negligent in failing to debrief and inform Plaintiff to the [LSD experiment] and in failing to continue to monitor his condition . . ." and that he suffers continuing and permanent psychological injuries as a result of Defendant's negligent failure to debrief him and to continue to monitor his condition. The Plaintiff does not causally connect the injuries resulting from the experiment with any conduct occurring *in its entirety* after Plaintiff's discharge. Although Plaintiff omits allegations of predischarge negligence in his Amended Complaint the court is not persuaded that the acts constituting the alleged negligence were separate and distinct from any acts occurring before discharge, so as to give rise to a separate actionable tort not barred by the *Feres* doctrine.

The court, therefore, concludes that plaintiff's claims under the FTCA must be dismissed for lack of subject matter jurisdiction based upon the Fifth Circuit's opinion in *Stanley*, including its reliance on *Schnurman v. United States*.

The Amended Complaint also alleges constitutional claims based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). While the court recognizes that a *Bivens* cause of action is available against individual officers and agents of the Government, the doctrine of sovereign immunity bars an action against the United States itself.

The question of whether a *Bivens* cause of action can be brought against the Government was addressed

by the United States Court of Appeals for the Third Circuit in *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979). In *Jaffee*, plaintiff claimed damages for injuries suffered as a result of radiation exposure while serving in the United States Army when assigned to participate in nuclear testing. The court, after concluding that Jaffee's claim could not be brought under the FTCA because of the *Feres* doctrine, proceeded to consider whether a cause of action could be brought against the Government pursuant to *Bivens*.

> Alternatively, Jaffee urges that this court can create an exception to the doctrine [of sovereign immunity] in order to grant relief for deliberate violation of constitutional rights. For authority supporting this argument, he turns to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and to *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). In *Bivens* the Court recognized an implied cause of action for damages against federal officers who had violated the fourth amendment. *Butz* held that certain federal executive officials did not enjoy an absolute immunity for the damage suits permitted by *Bivens*. From these cases Jaffee tries to extract the principle that "the applicable common law doctrine of governmental immunity must yield to the paramount necessity of vindicating constitutional guarantees." But the suits in *Bivens* and *Butz* were against individual federal officers and not against the United States. Because Jaffee has sued the Government itself, *Bivens* and *Butz* do not afford

> him a traversable bridge across the moat of sovereign immunity.

Jaffee, 592 F.2d 712, 717 (footnotes omitted). This court finds, therefore, that the plaintiff's *Bivens* claims herein cannot be maintained against the Government itself.

The Defendants' Motion to Dismiss also attacks the *Bivens*-type claims brought against the Unknown Individual Federal Agents and Officers. Defendants first argue that fictitious individual defendants are not proper parties. This argument is without merit. *See, e.g., Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982).

Defendants next argue that even if plaintiff has properly pled a *Bivens* cause of action against individual agents and officers, such claim is barred by the *Feres* doctrine.

The *Feres* case itself dealt exclusively with claims brought under the Federal Tort Claims Act. *See Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152. It did not address *Bivens*-type actions.

At least one United States Court of Appeals has held that although a claim against the Government under the FTCA may be barred by the *Feres* doctrine, a *Bivens* claim against individuals arising from the same set of facts is not barred by *Feres*. *See Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981). This court likewise holds that the *Feres* doctrine does not bar plaintiff's claims against the individual agents and officers.

The defendants also attack the Amended Complaint on the ground that the claims against the individual

defendants are time-barred. They contend that the applicable statute of limitations, the four-year period for actions involving negligent and intentional torts, Fla. Stat. § 95.11(3)(a) and (*o*), began to run in 1975 when plaintiff was first informed that he had been given LSD. Because the original complaint did not name individual defendants, defendants argue that the Amended Complaint cannot relate back to the original complaint as regards the individuals.

It is unnecessary for this Court to address the issue of relation-back. At the time plaintiff filed his original complaint the Fifth Circuit held a restrictive position as to causes of action brought pursuant to *Bivens*. *Stanley v. CIA*, 639 F.2d at 1156 n.12; *see Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978) (no right of action may be implied from the Due Process Clause of the fifth amendment). Thus, until the Supreme Court reversed the Fifth Circuit in *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), Stanley had no *Bivens* cause of action. As a result, the claims against the individuals in this case, which are based primarily on the Fifth Amendment, did not accrue until the Supreme Court's decision in 1979. It follows, therefore, that the claims against the individual officers and agents set forth in the Amended Complaint are not time-barred. *See United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972) (Because appellant had no reasonable probability of successfully prosecuting his claim prior to the enunciation of a new rule by the United States Supreme Court, for statute of limitations purposes the cause of action accrued on the date of the Supreme Court's decision); *United States v. LePatourel*, 593 F.2d 827 (8th Cir. 1979).

Finally, defendants argue that plaintiff's claim does not rise to one of constitutional magnitude, and counsels the court to exercise hesitation in recognizing a *Bivens* cause of action. Defendants characterize plaintiff's claim as "nothing more than a medical malpractice action based on lack of informed consent and negligent follow-up care."

The Supreme Court of the United States has recognized that there is a constitutional right to be free to decide for oneself whether to submit to drug therapy. *Mills v. Rogers*, —— U.S. ——, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982). Although it is difficult to locate the exact constitutional source of this right, courts have recognized it as a liberty or privacy interest associated with the penumbral right to privacy, bodily integrity, or personal security. *See Mills v. Rogers*, —— U.S. at —— & n. 7, 102 S.Ct. at 2447 & n. 7. This right to be free from the unwanted administration of drugs has also been associated with First Amendment rights because "the power to produce ideas is fundamental to our cherished right to communicate . . ." *See Mills v. Rogers*, —— U.S. at —— n. 3, 102 S.Ct. at 2446 n. 3.

This court views the conduct alleged in the Amended Complaint as an egregious intrusion on the most precious right protected by the Constitution—the right not to be deprived of life, liberty or property without due process of law. The surreptitious administration of LSD to an unwitting serviceman who believes he is involved in a project important to the development of defenses to chemical warfare constitutes a violation of the rights of privacy and bodily integrity, and of the right of an individual to control his mind, his private thoughts and his intellectual process.

It is ludicrous to suggest that such an intrusion upon a person by the federal government does not rise to a claim of constitutional magnitude, but is merely a medical malpractice claim.

In *Mills v. Rogers, supra,* the Supreme Court recognized that the unwanted administration of drug therapy by a state hospital to mental patients warranted constitutional scrutiny to determine whether the state's competing interests outweigh the individual's constitutionally protected interest in being free from such conduct. —— U.S. at ——, 102 S.Ct. at 2447. The deplorable nature of such conduct is multiplied by the facts in this case. The LSD was administered to the plaintiff by agents of the same government that guarantees the plaintiff his personal right to be free from such conduct, and whose constitutional duty it is to protect such personal interests. Moreover, it is the same government that lured the plaintiff into believing he was playing an important role in the defense of that government, and for which he presumably was acting out of an extreme sense of loyalty and duty. The conduct alleged in this case would shock—if not outrage—the conscience of any court, and is most certainly protected against by the Constitution of the United States.

Although the Court recognizes that the military relationship between Stanley and the officers and agents involved in the LSD experiments must be weighed against the individual's constitutional rights in order to determine whether a cause of action is maintainable in this case, the court cannot legally or morally find that relationship sufficient to overcome the liberty and privacy rights guaranteed by the Constitution. To do so would deprive the plaintiff and all military personnel similarly situated of any recourse

against the government or its agents, and thus would deprive them of their most fundamental civil rights.

In summary, it is ORDERED AND ADJUDGED as follows:

1. That as to the claims against the Government brought under the Federal Tort Claims Act, the Motion to Dismiss be and the same is hereby GRANTED.
2. That as to the claims against the Government brought pursuant to *Bivens*, the Motion to Dismiss be and the same is hereby GRANTED.
3. That as to the claims against the UNKNOWN INDIVIDUAL FEDERAL AGENTS AND OFFICERS, the Motion to Dismiss be and the same is hereby DENIED.

It is FURTHER ORDERED AND ADJUDGED that, pursuant to 28 U.S.C. § 1292(b), the Court finds that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Furthermore, should either of the parties file a Notice of Appeal of this Order, there shall be a stay of the proceedings in this cause until further Order of the Court.

APPENDIX F

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT B

No. 79-2571

JAMES B. STANLEY, PLAINTIFF-APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY; UNITED STATES DEPARTMENT OF DEFENSE; U.S. ARMY,
DEFENDANTS-APPELLEES

March 16, 1981

Appeal from the United States District Court
for the Southern District of Florida

Before GODBOLD, Chief Judge, and TUTTLE and HILL, Circuit Judges.

TUTTLE, Circuit Judge:

Appellant James B. Stanley appeals from the district court's granting of summary judgment in favor of defendant. Appellant brought suit against the United States [1] under the Federal Torts Claims Act,

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[1] Plaintiff's original complaint, filed May 8, 1978, named as defendants the Central Intelligence Agency, the United States

28 U.S.C. § 1346(b), § 2671 *et seq.* to recover for injuries sustained allegedly as a result of defendant's negligent administration of a chemical warfare experimentation program in which Stanley was a participant. The district court found that Stanley's injuries arose out of activity incident to military service and held, therefore, that the claim was barred by the *Feres* doctrine.

Three issues are raised on this appeal. The first is whether the district court correctly found that Stanley's claims were for injuries incurred while engaging in activity incident to service and thus within the ambit of the *Feres* doctrine. The second issue is whether Stanley alleged a cause of action based on injuries sustained subsequent to his discharge. Finally, we must decide whether the district court properly ordered the entry of summary judgment rather than dismissing the case for lack of subject matter jurisdiction. We find that the trial court correctly applied *Feres* and held the United States immune to all of Stanley's claims under the Federal Tort Claims Act, since all of his injuries arose while he was engaged in activity incident to his military service. However, we reverse the granting of summary judgment, as we find that, once having found the *Feres* doctrine applicable, the district court should have dismissed the case for lack of subject matter jurisdiction.

I. FACTS

In February, 1958, appellant was a Master Sergeant in the United States Army, stationed with his wife and children at Fort Knox, Kentucky. Respond-

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Department of Defense and the U.S. Army. Subsequently, plaintiff's motion to amend the complaint to name the United States Government as a party defendant was granted.

ing to a posted notice, appellant volunteered to participate in an Army program allegedly intended to aid the Army in developing and testing methods of defense against chemical warfare.[2] He was assigned to the Army base at Edgewood Arsenal, Aberdeen, Maryland. There, during the course of clinical testing, he was given Lysergic Acid Diethylamide (commonly known as LSD) without his knowledge.

Appellant claims that the defendants were negligent in several respects in their administration of the program.[3] Primarily, appellant points to their alleged

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[2] The statutory basis for the program was the Organization of the Army Act of 1950 (64 Stat. 322, 5 U.S.C. § 235a) which authorized the Secretary to conduct research and development programs related to activities of the Army. On February 26, 1953, the Secretary of Defense promulgated a memorandum to the service secretaries setting forth policy concerning use of volunteers in research. On November 3, 1955, the Secretary of the Army issued General Order No. 64 authorizing and directing the Director of Research and Development to act for the Secretary in matters of research and development. On May 17, 1956, the Director of Research and Development approved a program for the use of volunteers in psychochemical research, including defense against the chemical warfare use of Lysergic Acid Diethylamide.

[3] The complaint specifically alleged negligence in the following respects: (1) Defendants knew or should have known that LSD is a consciousness and behavior altering drug capable of producing irreparably harmful results, including death, and that the drug would affect different persons in different, unpredictable ways; (2) Defendants breached their duty to warn Plaintiff; (3) Defendants failed to take adequate precautions; (4) Defendants negligently failed to debrief Plaintiff after administering the drug to advise of the potentially hazardous physiological and psychological effects; (5) Defendants negligently failed to continue to monitor the Plaintiff following the experiment; (6) Defendants negligently failed to obtain Plaintiff's informed consent.

negligence in their administration of LSD to human subjects, their failure to obtain his informed consent to participate in the experiment, and their failure to debrief and monitor him after the test. Appellant claims that he suffered, as a result of this negligence, severe physical and mental injuries which caused him continual problems in the performance of his military duties and ultimately disrupted his marriage.

After completing the testing, appellant returned to his regular duties and continued his career in the Army for eleven years. He retired honorably as a Sergeant First Class in 1969. In 1975, when he received a letter from the Department of the Army, Walter Reed Medical Center, soliciting his participation in a follow-up study of volunteers who participated in the 1958 experiments at Edgewood Arsenal, appellant learned for the first time that he had been given LSD during the course of the 1958 experimentation.

Appellant filed claims with the United States Army and the Central Intelligence Agency [4] which were denied.[5] Thereafter, Stanley filed this suit in the district court for the Southern District of Florida.

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[4] The CIA found that its records disclosed no evidence that they had participated in the experiments. The Army office of the Judge Advocate General also found nothing in their records which indicated CIA involvement.

[5] On November 16, 1977, Stanley received a letter from the U.S. Army Claims Service informing him that his claims under the FTCA were not payable since "injuries to individuals incurred while on duty with the United States Army are considered to be incident to the individual's service, *Feres v. United States.*" The letter further advised him that he could file suit in the appropriate United States District Court if he was dissatisfied with the action taken on his claim.

II. APPLICABILITY OF FERES

In *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court considered the claims of three servicemen for recovery under the Federal Tort Claims Act for injuries sustained while they were on active duty. The Court was persuaded to dismiss the suits by consideration of factors such as the "peculiar and special relationship of the soldier to his superior, the effect of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." *United States v. Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 143, 99 L.Ed. 139 (1954).[6] The Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159.

Although the *Feres* doctrine has been questioned at times,[7] its viability was recently reaffirmed by the

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[6] Other factors considered by the Court in *Feres* include the notion that Congress could not have intended to include military personnel within the FTCA coverage, given the statutory compensation system for members of the armed service; the fact that plaintiffs could not point to any liability of a private individual analogous to that which they were asserting against the United States; and the concern that application of local tort law under the FTCA would interfere with the uniform conduct of military activities by imposing standards of care that varied from state to state.

[7] *See* discussion in *Parker v. United States*, 611 F.2d 1007, 1010-11 (5th Cir. 1980); Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery? 77 Mich. L. Rev. 1099 (1979).

Supreme Court. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed. 2d 66 (1976). Therefore, if Stanley was engaged in activities incident to his military service at the time his injuries arose, the district court was correct in holding the United States immune to Stanley's suit under the Federal Tort Claims Act.

Appellant argues that his participation in the chemical warfare testing program should not be considered "activity incident to service" because he was a volunteer and had been given a release from his regular duties in order to participate in the program. Additionally, appellant contends that the Government's activity here was illegal and thus should not be covered by the *Feres* doctrine.

Appellant has no sound authority for his assertion that the voluntary status of his participation in the program necessitates the conclusion that *Feres* should not control. *Feres* has been applied in cases involving a wide range of voluntary activity. *See, e.g., Charland v. United States*, 615 F.2d 508 (5th Cir. 1980) (servicemen killed while voluntarily participating in a Navy Seal Training exercise); *Uptegrove v. United States*, 600 F.2d 1248 (9th Cir. 1979) (serviceman killed while voluntarily traveling as a military space available passenger); *Mason v. United States*, 568 F.2d 1135 (5th Cir. 1978) (per curiam) (motor vehicle accident on base while serviceman tending to personal business); *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975) (serviceman injured while riding horse rented from stable owned and operated by Marine Corps); *Chambers v. United States*, 357 F.2d 224 (8th Cir. 1966) (serviceman injured in swimming pool at an Air Force base); *Schnurman v. United States*, 490 F.Supp. 429 (E.D.Va.1980) (serv-

iceman injured while participating voluntarily in Naval experiment designed to test the effectiveness of certain protective clothing when exposed to sulphur mustard gas); *Schmid v. Rumsfield*, 481 F.Supp. 19, 21 (N.D.Cal.1979) (serviceman assaulted as result of his voluntary activities as informant assisting in the recovery of stolen government property and prosecution of drug offenses); *Loeh v. United States*, No. 77-2065-B and 77-2023-B (S.D.Ill. April 23, 1979) (serviceman injured when administered LSD while participating voluntarily in Army drug experimentation program).

Additionally, courts have consistently applied *Feres* in suits to recover for the alleged medical malpractice of Army physicians and surgeons where the claimant's activity when injured was essentially voluntary in nature. *See, e.g., Veillette v. United States*, 615 F.2d 505 (9th Cir. 1980); *Vallance v. United States*, 574 F.2d 1282 (5th Cir.) (per curiam), *cert. denied*, 439 U.S. 965, 99 S.Ct. 453, 58 L.Ed.2d 423 (1978); *Peluso v. United States*, 474 F.2d 605 (3d Cir.) (per curiam), *cert. denied*, 414 U.S. 879 94 S.Ct. 50, 38 L.Ed.2d 124 (1973); *Hall v. United States*, 451 F.2d 353 (1st Cir. 1971); *Howell v. United States, et al.*, 489 F.Supp. 147 (W.D.Tenn.1980). *Feres* has even been applied in cases involving elective surgery. *Harten v. Coons*, 502 F.2d 1363 (10th Cir.), *cert. denied*, 420 U.S. 963, 95 S.Ct. 1354, 43 L.Ed.2d 441 (1974); *Lowe v. United States*, 440 F.2d (5th Cir.), *cert. denied*, 404 U.S. 833, 92 S.Ct. 83, 30 L.Ed.2d 64 (1971). Moreover, the servicemen in the three cases before the Supreme Court in *Feres* itself were all engaged in essentially voluntary activity at the time they were injured. Therefore, appellant's contention that the voluntary nature of his participation in the

program should take him outside the bounds of *Feres* is without merit.

Likewise, the fact that appellant had been given a release from his regular duties does not preclude the possibility that appellant was injured while engaging in "activity incident to service." In a factual setting virtually identical to the one at hand, the Second Circuit found that the serviceman was on active duty at the time the experimentation took place despite the fact that the plaintiff was on a "Temporary Duty Assignment" when he was administered LSD. *See Lerner v. United States, et al.*, No. 76 Civ. 4349 (S.D.N.Y. Jan. 16, 1978), *aff'd mem*, 578 F.2d 1368 (2d Cir., 1978). Similarly, in *Mason v. United States, supra*, this Court was not persuaded by the argument that *Feres* should not apply when a serviceman was injured during the time in which he had been given a release from his routine duties. The court reasoned that the serviceman was still subject to all military regulations and was available for emergency service or temporary duties and held the government immune to suit. 568 F.2d at 1136. *See also Stansberry v. Middendorf*, 567 F.2d 617 (4th Cir. 1978) (per curiam); *Thomason v. Sanchez*, 398 F.Supp. 500 (D.N.J. 1975), *aff'd*, 539 F.2d 955 (3d Cir. 1976) (*Feres* applied where serviceman injured while riding motorcycle on base during "off-duty" hours); *Watkins v. United States*, 462 F.Supp. 980 (S.D. Ga. 1977) (serviceman injured on base during "off duty" hours).

Appellant relies upon several cases in which military plaintiffs were allowed to recover despite the government's argument that *Feres* should apply. Those cases, however, all involved situations which are distinguishable from the situations at hand. For

example, in *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954), the Supreme Court allowed a veteran to pursue his claim under the FTCA since he had actually been discharged at the time he was injured. *See also Bankston v. United States*, 480 F.2d 495 (5th Cir. 1973). In contrast, Stanley does not claim to have been discharged at the time he participated in the experiments. Stanley also fails to allege that he was on furlough or on a pass as were the plaintiffs in *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949) and *Knecht v. United States*, 144 F.Supp. 786 (E.D.Pa. 1956), *aff'd* 242 F.2d 929 (3d Cir. 1957). Finally Stanley was not tending to his personal affairs as he saw fit at the time of the accident as were the plaintiffs in *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980) and *Hand v. United States*, 260 F.Supp. 38 (M.D. Ga. 1966). *See also Downes v. United States*, 249 F.Supp. 626 (E.D.N.C. 1965).[8]

The fact that the injury occurred on a military base is strong evidence that the plaintiff was engaged in activity incident to service at the time, although this fact alone is not dispositive. *See Hand v. United States, supra; Downes v. United States, supra.* The Court must consider the totality of the circumstances surrounding the injury and distinguish between "those cases involving activities arising from life on the military reservation and those in which the presence on the base has little to do with the soldier's military service." *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980).

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[8] Moreover, the fact that a serviceman was tending to personal affairs at the time of his injury has not always led a court to find the situation outside the bounds of *Feres*. *See, e.g., Mason v. United States*, 568 F.2d 1135 (5th Cir. 1978); *Zoula v. United States*, 217 F.2d 81 (5th Cir. 1954).

In the *Parker* case, this Court held that a serviceman's claim under the Federal Tort Claims Act was not foreclosed even though the injury occurred on a military base where the function the plaintiff was performing at the time of his death was not related to his military status and did not arise from his life on the base. The court allowed Parker to maintain his suit under the Act since he was on a four day pass and merely driving through the base while tending to the purely personal business of moving his family to a new home at the time the accident occurred.[9]

In contrast, Stanley was not on a pass and was not tending to purely personal business at the time this alleged injury arose. At the time Stanley was given LSD, he was a Master Sergeant in the Army who had volunteered to participate in an experimental program in lieu of his regular duties. The experiment was conducted on an Army base by and for the benefit of the Army. Thus, the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship. *See Lee v. United States*, 261 F.Supp. 252, 256 (C.D.Cal. 1966), *rev'd* 400 F.2d 558 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969). *See also, Camassar v. United States*, 400 F.Supp. 894 (D.Conn. 1978), *aff'd per curiam*, 531 F.2d 1149 (2d Cir. 1976). Stanley had been informed that he was free to leave the testing program at any time; however, this freedom appears to have been restricted to his returning to his original post at Fort Knox. He did return to his original duties there after he was

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[9] The *Parker* court indicated that *Feres* might have applied had Parker been attending to personal affairs arising from life on the base, such as participating in recreational activities or shopping.

released from Edgewood and remained in the service for eleven years. At least, therefore, he was subject to ultimate military control throughout the duration of his participation in the program. *See Mills v. Tucker*, 499 F.2d 866 (9th Cir. 1974) (per curiam); *cf. Hall v. United States*, 451 F.2d 353 (1st Cir. 1971) (rejecting contention that *Feres* applies only where military discipline is involved.) Stanley was receiving military pay and was promised a letter of commendation for his participation in the program. Clearly his participation in the program was activity incident to his military service despite the fact that he had been given a release from his regular duties. *See Garrett v. United States*, 625 F.2d 712 (5th Cir. 1980); *Shults v. United States*, 421 F.2d 170 (5th Cir. 1969) (per curiam).

The trial court also correctly disposed of appellant's contention that the testing program was so "patently illegal" that it could not be considered activity incident to service. The cases cited by appellant in support of this contention are inapposite as they do not involve tort claims by servicemen or address the applicability of the *Feres* doctrine. *See Birnbaum v. United States*, 436 F.Supp. 967 (E.D.N.Y. 1977); *Avery v. United States*, 434 F.Supp. 937 (D.Conn. 1977); *Cruikshank v. United States*, 431 F.Supp. 1355 (D.Hawaii 1977). Moreover, the argument that a drug testing program such as the one involved in this case should be considered outside the scope of the *Feres* doctrine since the program was not the kind of activity which might reasonably be anticipated as ancillary to military service has been rejected in two other cases involving facts virtually identical to those before this Court. *Lerner v. United States, supra; Loeh v. United States, supra; Nagy v. United States,*

471 F.Supp. 383 (D.D.C. 1979). *See also Southard v. United States*, 397 F.Supp. 409 (E.D. Pa. 1975) (*Feres* applied despite allegation of illegal conduct by the Army).

The *Feres* doctrine has been applied broadly over the years. Although the action before the Court in *Feres* was against the United States, the doctrine has been extended to apply to suits against individual defendants. *See, e.g., Bailey v. DeQuevedo*, 375 F.2d 72 (3d Cir. 1967); *Bailey v. Van Buskirk*, 345 F.2d 298 (9th Cir. 1965), *cert. denied*, 383 U.S. 948, 86 S.Ct. 1205, 16 L.Ed.2d 210 (1966). Likewise, although the *Feres* case involved allegations of negligence, the doctrine has been extended to hold the United States immune to suits based on intentional or reckless as well as constitutional torts. *See, e.g., Jaffe v. United States*, 468 F.Supp. 632, 635 (D.N.J. 1979), *aff'd*, 592 F.2d 712 (3d Cir. 1979), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066; *Citizen National Bank of Waukegan v. United States*, 594 F.2d 1154 (7th Cir. 1978); *Calhoun v. United States*, 475 F.Supp. 1 (S.D.Cal. 1977), *aff'd*, 604 F.2d 647 (9th Cir. 1979), *cert. denied*, 444 U.S. 1077, 100 S.Ct. 1079, 62 L.Ed.2d 761 (1980); *Misko v. United States*, 453 F.Supp. 513 (D.D.C. 1978); *aff'd* 593 F.2d 1371 (D.C. Cir. 1978); *Rotko v. Abrams*, 338 F.Supp. 46 (D.Conn. 1971), *aff'd*, 455 F.2d 992 (2d Cir. 1972); *Everett v. United States*, 492 F.Supp. 318, 322 (S.D. Ohio E.D., 1980); *Schnurman v. United States, supra*; *Sigler v. LeVan*, 485 F.Supp. 185, 191 (D.Md. 1980); *Schmid v. Rumsfeld*, 481 F.Supp. 19, 21 (N.D.Cal. 1979); *Nagy v. United States, supra; Thornwell v. United States*, 471 F.Supp. 344, 348 (D.D.C. 1979); *Lange v. Black*, No. 78-518-E (S.D. Cal. Jan. 3, 1979). *But see Jaffee v. United States*,

No. 79-1543 (3d Cir. Feb. 20, 1980) (petition for rehearing en banc granted, April 11, 1980); *James v. United States*, 358 F.Supp. 1381 (D.R.I. 1973). These extensions of the *Feres* doctrine have been premised in the notion that the same policies underlying the *Feres* doctrine are involved regardless of whether the suit is against the United States or the specific individual responsible and whether or not the legal theory of a complaint is negligence. Despite the apparent harshness of the application of *Feres* to the facts before us, we are compelled to conclude that the trial court correctly applied *Feres* and held the United States immune to Stanley's suit under the Federal Tort Claims Act for injuries allegedly sustained due to negligence in the administration of the drug testing program at Edgewood Arsenal.

III. SEPARATE TORT THEORY

As an additional point on appeal, appellant contends that even if *Feres* precludes his recovery of damages based on the original experiments, he has properly alleged a separate cause of action for damages due to the negligent failure of the Army officers involved to monitor his condition after his discharge which would not be barred by *Feres*. For this contention, he relies principally on a case involving similar facts, *Thornwell v. United States*, *supra*, where the court allowed recovery damages resulting from the government's failure to provide a veteran with follow-up treatment after his discharge. 471 F.Supp. at 349-53.[10]

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[10] The *Thornwell* court found that the plaintiff there could recover both for acts of negligence and violations of his Fifth Amendment rights which occurred after his discharge.

Appellees argue that appellant's reliance upon the *Thornwell* case constitutes a new theory which appellant should not be entitled to raise for the first time in a reply brief to this appellate court. *See Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976); *Capps v. Humble Oil and Refining Co.*, 536 F.2d 80 (5th Cir. 1976); *Stanley Educational Methods, Inc. v. Becker C.P.A. Review Course, Inc.*, 539 F.2d 393 (5th Cir. 1976). We need not decide the correctness of appellee's argument on this point because we find that, in any case, Stanley has failed to allege facts which bring his case within the separate tort theory of the *Thornwell* case.

In *Thornwell*, the district court considered claims of a serviceman who had been surreptitiously drugged with LSD and then subjected to intense interrogation after he had been imprisoned as part of an Army investigation into the theft of a large number of classified documents. During his imprisonment, Thornwell had been subjected to several different, harsh interrogation techniques; the use of LSD was part of the investigation as well as part of an Army program to test the utility of LSD as an aid to interrogation. The court applied the *Feres* doctrine and dismissed those of Thornwell's claims which were based on injuries sustained due to the administration of LSD to him while he was in the service; however, the court found that *Feres* did not preclude Thornwell from pursuing claims based on injuries due to conduct occurring after his discharge. The court concluded that *Feres* should not apply to the post-discharge claims because Thornwell had been injured by two entirely separate torts—an intentional act while he was on active duty and a subsequent negligent act which "occurred, *in its entirety*, after he

attained civilian status." 471 F.Supp. at 351 (emphasis in original). The court found that this result was compelled by *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954), where the Court ruled that *Feres* should not prevent a veteran from recovering for service-related injuries which were aggravated by an operation performed negligently six years after his discharge from the service. Additionally, the court found that Thornwell's situation was analogous to that of the plaintiff in *Schwartz v. United States*, 230 F.Supp. 536 (E.D. Pa. 1964). There the court allowed recovery for injuries resulting from the negligent failure of the government to provide proper follow-up care to a veteran who had been treated with a radioactive contrast dye, umbrathor, when he had experienced sinus trouble while he was an enlisted man in the Navy. *See also Hungerford v. United States*, 192 F.Supp. 581 (N.D. Cal. 1961), *rev'd on other grounds*, 307 F.2d 99 (9th Cir. 1962).

Initially, we find that Stanley has failed to allege an intentional tort committed while he was in the service. Although there is some language in the *Thornwell* case which would indicate that a negligent act will in some circumstances suffice as the original tort,[11] at least one court following *Thornwell* emphasized the fact that the plaintiff there, like the plaintiff in *Thornwell*, had undergone a wilfully inflicted tort while on active duty. *Everett v. United States*, *supra* at 326 n.6. *See also Schnurman v. United States*, *supra* at 429. Thus the clearest way to fall within the theory of *Thornwell* would be to allege an intentional or wilful tort injuring an active duty serviceman and a negligent or intentional fail-

[11] *See* 471 F.Supp. at 352.

ure to provide proper follow-up care which begins after the plaintiff's discharge from the service.

Even if Stanley's allegations of negligence suffice as the original tort, however, he has failed to allege a separate negligent act occurring "entirely after discharge." The plaintiff in *Schwartz v. United States*, *supra*, unlike the plaintiff here, based no claim on negligence occurring during the time he was in the service. His sole contention was that he had been injured by a series of negligently performed medical tests during the twelve year period after his discharge, which resulted in his injuries. There was no such active negligence alleged to have occurred after Stanley's discharge. Stanley has alleged merely an act of negligence which occurred while he was on active duty, the effects of which remained uncorrected after discharge. *See Nagy, supra.*

Moreover, even if the *Thornwell* court is correct in its conclusion that a mere failure to provide information is a separate actionable tort, we are not persuaded that the negligent failure to warn in Stanley's case occurred "entirely after his discharge." Thornwell received a general discharge just four months after he was given LSD. Thus, the government's failure to monitor his condition took place entirely after his discharge. Stanley, on the other hand, remained in the service for eleven years after the administration of the drug. Even if the government was negligent in failing to monitor his condition and provide him with any treatment, this negligent failure to monitor him cannot be seen as having taken place "entirely after his discharge." Stanley has at best alleged two negligent acts, the administration of the LSD and the negligent failure to monitor his condition, both of which occurred at least in part during his time as a serviceman even if they or their effects

lingered after his discharge. Allegations of such "continuing torts" do not escape the application of the *Feres* doctrine.

In the *Feres* case, one of the claimants alleged that a towel had been left in his stomach during an operation while he was in the service. The towel was discovered during an operation taking place after his discharge yet the court dismissed the complaint since the original injury had occurred while he was in the service. In several other analogous cases, the courts characterized the situations as simple acts of negligence which remained uncorrected after discharge and denied recovery despite allegations of a failure to provide follow-up care. *See Henning v. United States*, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016, 92 S.Ct. 676, 30 L.Ed.2d 664 (1972) (failure to inform veteran of true content of X-rays which had been taken while he was on active duty); *Schnurman v. United States*, *supra*, (failure to provide veteran with follow-up care and supervision for injuries resulting from his exposure to mustard gas while he was a serviceman participating in an experiment to test protective clothing); *Wisniewski v. United States*, 416 F.Supp. 599 (E.D. Wis. 1976) (veteran's claim based on a failure to provide him either before or after his discharge with results of a blood test taken while he was in the service). Morover, in the *Thornwell* case itself the court stated:

> Whatever the broader complications of [*Henning* and *Wisniewski*], it is clear at the very least that a mere act of negligence which takes place while the plaintiff is on active duty and which then remains uncorrected after discharge is not grounds for suit.

471 F.Supp. at 351. We find that Stanley likewise has failed to allege a negligent act occurring entirely

after his discharge necessary to fall within the separate tort theory of *Thornwell.*

In reaching this conclusion we are persuaded by the reasoning of the court in *Schnurman v. United States, supra.* In that case a serviceman who had volunteered in 1944 to participate in an experiment designed to test the effectiveness of protective clothing against exposure to sulphur mustard gas was injured when his gas mask malfunctioned. Two years later he was discharged from the service. For thirteen years after his discharge he sought medical help for chest pains, respiratory problems and other ailments but never mentioned the possibility that those injuries were the result of mustard gas exposure. In 1976 the claimant notified a doctor that he had once been exposed to sulphur mustard gas and the doctor concluded that the plaintiff's medical problems resulted from this exposure. The plaintiff then filed suit, alleging that he had been injured by the government's negligent failure to provide him after his discharge with follow-up examinations, treatment, supervision or to warn him of the risk of physical injury presented by his exposure to mustard gas The court found that: "The Department of the Navy could well have been more attentive to plaintiff's immediate reactions to the mustard exposure and perhaps should have ensured that the subjects were fully informed of the true nature of the experiment once the need for secrecy had passed." 490 F.Supp. at 437. Nevertheless, the court rejected plaintiff's argument based on *Thornwell.* In so doing the court stated:

> Without commenting on the compatibility of [the holdings in *United States v. Brown, Schwartz v. United States* and *Thornwell*] with

the *Feres* doctrine, the Court concludes that application of this continuing or separate tort theory to plaintiff's case would be inconsistent both with the instant facts and with the language and rationale of *Feres*. Plaintiff's brain, cardiovascular, hearing, respiratory, and eyesight difficulties for which he seeks compensation were not shown to be caused in any way by the government's failure to treat plaintiff after discharge or to warn him of the true nature of the gas to which he had been exposed. There was no testimony that his injuries were in any way aggravated or multiplied by this alleged negligence on the part of the government, nor was it shown that follow-up treatment could have avoided any long-term effects of the exposure, as was the case in *United States v. Brown, supra.* Indeed, simply stated, there was no evidence to support a conclusion that there was any causal connection between the plaintiff's present condition and the government's alleged failure in regard to the issue now addressed. The *Feres* doctrine, in the Court's view, is one of broad application. Disallowing recovery for an in-service tort under *Feres*, but allowing recovery for a failure to monitor and treat injuries resulting from that same tort would leave very little of *Feres* immunity, especially in cases where injuries do not manifest themselves until after a serviceman's discharge. *See Broudy v. United States*, Civ. No. 79-02626LEW(GX) (C.D.Cal., Jan. 2, 1980).

Id. Similarly, we conclude that the facts and rationale of the *Feres* doctrine demand its application in this case.

IV. GRANTING OF SUMMARY JUDGMENT

Appellant contends that even if the trial court was correct in finding that *Feres* applied to the facts of this case, the court erred in disposing of the case by way of summary judgment rather than dismissal for lack of subject matter jurisdiction. This contention is based on the notion that if *Feres* applies, a district court lacks subject matter jurisdiction because the *Feres* doctrine is a judicially created exception to the waiver of sovereign immunity contained in the Federal Tort Claims Act and when the government has not consented to suit, the court has no subject matter jurisdiction to hear the claim. Appellant argues that once a court has determined that *Feres* applies, the court lacks subject matter jurisdiction, and, therefore, has no power to render a judgment on the merits of the case. Thus, he contends that the trial court in this case had no power to grant summary judgment, which acts as a final adjudication on the merits, but should have dismissed the case without prejudice. *See Dassinger v. South Central Bell Telephone Co.*, 505 F.2d 672 (5th Cir. 1974); *State of Oregon v. United States*, 195 F.Supp. 276 (D.Ore. 1961), *aff'd* 308 F.2d 568 (9th Cir. 1962), *cert. denied*, 372 U.S. 941, 83 S.Ct. 934, 9 L.Ed.2d 967 (1963); *People v. United States*, 307 F.2d 941 (9th Cir. 1962). *See generally*, 6 *Moore's Federal Practice*, ¶ 56.03, ¶ 56.26.

Appellant points also to cases holding that summary judgment is an extreme remedy which is proper only if the claimant is not entitled to recovery under any circumstance. *See, e.g., Weber v. Towner County*, 565 F.2d 1001 (8th Cir. 1977); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (D.C.N.Y. 1973). He contends that he has a separate theory

of recovery based on the Constitution and 28 U.S.C. § 1331. *See Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).[12] Appellant, therefore, asks this Court to reverse the granting of summary judgment and to remand with directions that the claim be dismissed for lack of subject matter jurisdiction and that the plaintiff be allowed to amend "to correct a defective allegation of jurisdiction," 28 U.S.C. § 1653.

"The United States, as sovereign, is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1352, 63 L.Ed.2d 607 (1980), *quoting United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed.1058 (1941). *Accord, Enfinger v. Enfinger*, 452 F.Supp. 553 (M.D.Ga.1978). Where no such consent exists, a district court has no jurisdiction to entertain a suit against the United States. *Mitchell, supra*, 445 U.S. at 538, 100 S.Ct. 1352. *United States v. King*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969); *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888 (1940); *Sprouse v. Federal*

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[12] At the time plaintiff filed his complaint in this case, the Fifth Circuit took a restrictive approach to causes of action under *Bivens*. *See Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc); *Seibert v. Baptist*, 594 F.2d 423 (5th Cir. 1979). However, subsequent to the trial court's granting of summary judgment in this case, the Fifth Circuit's decision in *Davis* was reversed by the Supreme Court. *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). This Court has applied *Davis* retroactively, *Seibert v. Baptist*, 599 F.2d 743 (5th Cir. 1979).

Prison Industries, Inc., 480 F.2d 1, 3 (5th Cir. 1973).

The Federal Tort Claims Act is a waiver of the federal government's immunity for the torts of its employees under certain circumstances. The Act provides that the United States shall be liable for "injury or . . . death caused by the negligent or wrongful act or omission of any employer [sic] of the Government . . . under circumstances where the United States, if a private person, would be liable to the claimant. . . ." 28 U.S.C. § 1346(b). This waiver has been construed broadly. *See United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S.Ct. 63, 95 L.Ed. 595 (1951). However, this consent to suit is not without exceptions. The Act itself excludes certain types of government action from judicial review. 28 U.S.C. 2680. More importantly, in *Feres v. United States*, the Supreme Court held that the Act did not waive immunity for claims brought by servicemen for injuries sustained while on active duty. *Dalehite v. United States*, 346 U.S. 15, 31, n.25, 73 S.Ct. 956, 965, 97 L.Ed. 1427 n.25 (1953). Courts have uniformly held that where conduct complained of falls within one of the statutory exceptions to the FTCA, the district court is without jurisdiction of the subject matter thereof. *See, e.g., First National Bank v. United States*, 552 F.2d 370, 374 (10th Cir. 1977), *cert. denied*, 434 U.S. 835. 98 S.Ct. 122, 54 L.Ed.2d 96 (1977); *Smith v. United States*, 546 F.2d 872, 876 (10th Cir. 1976); *Gibson v. United States*, 457 F.2d 1391, 1392 n.1 (3d Cir. 1972); *Konecny v. United States*, 388 F.2d 59 (8th Cir. 1967); *Sanchez Tapia v. United States*, 338 F.2d 416 (2d Cir. 1964); *Summers v. United States*, 480 F.Supp. 347, 349 (D.Md.1979). We conclude that

when a case under the Tort Claims Act falls within the bounds of *Feres*, a judicially created exception to the Act, the Court likewise has no jurisdiction to hear the case.

A federal district court is under a mandatory duty to dismiss a suit over which it has no jurisdiction. *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 671-72 (5th Cir. 1978); *Rodriquez v. Ritchey*, 556 F.2d 1185, 1192 n.30 (5th Cir. 1977) (en banc); *Scott v. Abilene Independent School District*, 438 F.Supp. 594, 598 (N.D.Ga.1977). When a court must dismiss a case for lack of jurisdiction, the court should not adjudicate the merits of the claim. *Durham v. Mason and Dixon Lines, Inc.*, 404 F.2d 864 (6th Cir. 1968); *Guthrie v. Dow Chemical Co.*, 445 F.Supp. 311, 315 (S.D.Tex.1978). Since the granting of summary judgment is a disposition on the merits of the case, a motion for summary judgment is not the appropriate procedure for raising the defense of lack of subject matter jurisdiction. *Studio Electrical Technicians, Local 728 v. International Photographers of the Motion Picture Industries, Local 659*, 598 F.2d 551, 552, n.2 (9th Cir. 1979); *O'Donnell v. Wien Air Alaska, Inc.*, 551 F.2d 1141, 1144-45 n.3 & 4 (9th Cir. 1977); *Solomon v. Solomon*, 516 F.2d 1018 (3d Cir. 1975); *Kowalezwk v. Walsh*, 482 F.Supp. 959, 962 (D.Mass.1979); *Titsch Printing, Inc. v. Hastings*, 456 F.Supp. 445 (D.Colo. 1978); *Parker Drilling Company v. Metlakatla Indian Community*, 451 F.Supp. 1127, 1130 n.1 (D. Alaska 1978). *See also, Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 512 (5th Cir. 1980). *See generally*, 10 *Wright & Miller, Federal Practice and Procedure*, § 2713, p. 402 *et seq.* Therefore, since a defense based on the *Feres* doctrine is premised on

the notion that there is no jurisdiction to hear the claim as the United States has not waived sovereign immunity for that kind of suit, such defenses should be raised by a motion to dismiss for lack of subject matter jurisdiction rather than by a motion for summary judgment. *See Donham v. United States*, 395 F.Supp. 52, 53 (E.D.Mo.E.D.1975), *aff'd*, 536 F.2d 765 (8th Cir. 1976), *aff'd sub nom., Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1976); 6 *Moore's Federal Practice*, § 56.17[65] at 56-1091, ¶ 56.26[1] at 1513-14. *See also, Mitchell v. Riddell*, 402 F.2d 842 (9th Cir. 1968), *cert. denied*, 394 U.S. 456, 89 S.Ct. 1223, 22 L.Ed.2d 415 (1969); *Jorrie v. Imperial Investment Company*, 355 F.Supp. 1088 (W.D.Tex. 1973)). Accordingly, we conclude that the court below erred in granting summary judgment in favor of the United States and should have dismissed the case for lack of subject matter jurisdiction.

The government's arguments to the contrary are not persuasive. Appellees correctly state the rule [13] that a district court must treat a 12(b)(6) motion for failure to state a claim as a motion for summary judgment where the trial court considers matters outside the pleadings. *See United Independent School*

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[13] Federal Rule Civil Procedure 12(b) provides in pertinent part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

District v. City of Laredo, 634 F.2d 1353 (5th Cir. 1980) (Unpublished); *Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc.*, 568 F.2d 1074, 1077 (5th Cir.), *cert. denied*, 439 U.S. 836, 99 S.Ct. 120, 58 L.Ed.2d 133 (1978). However, a 12(b)(1) motion for lack of jurisdiction over the subject matter is not so converted. *Mortensen v. First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3d Cir. 1977); *Rosemound Sand and Gravel Company v. Lambert Sand and Gravel Company*, 469 F.2d 416, 417 (5th Cir. 1972); *Riley v. Titus*, 190 F.2d 653, 655 n.1 (D.C. Cir. 1951); *Air Line Pilots Association v. Northwest Airlines, Inc.*, 444 F.Supp. 1138, 1142 (D.D.C.1978). *See also, Land v. Dollar*, 330 U.S. 731, 735 n.4, 67 S.Ct. 1009, 1010, 91 L.Ed. 1209 (1947). A dismissal for failure to state a claim is a disposition on the merits. *Kuhn v. National Association of Letter Carriers, Branch 5*, 570 F.2d 757, 760 n.5 (8th Cir. 1978). Since appellant's allegations should not have survived the 12(b)(1) jurisdictional attack based on *Feres*, the court had no jurisdiction to dispose of the case on the merits by reaching the 12(b)(6) motion of dismissal for failure to state a claim. *See Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 513 (5th Cir. 1980). Therefore, the fact that the trial court in this case considered matters outside the pleadings fails to render his action in treating the *Feres* issue on a motion for summary judgment proper. *See O'Donnell v. Wien Air Alaska, Inc., supra.*

The government also relies on several cases where the court affirmed the granting of summary judgment since subject matter jurisdiction was found lacking. *See, e.g., Sherwood Medical Industries v. Deknotel*, 512 F.2d 724 (8th Cir. 1975); *McDaniel*

v. Travelers Insurance Co., 494 F.2d 1189 (5th Cir. 1974) (per curiam). These cases, however, are not binding authority for the government's assertion that we should affirm the granting of summary judgment in this case. In the *Sherwood* case, the Eighth Circuit affirmed the granting of summary judgment because the court found there was no "actual controversy" as is required for a suit under the Declaratory Judgment Act. Summary judgment there was appropriate as the Declaratory Judgment Act does not of itself create jurisdiction so the court must have had another basis of jurisdiction in order to have reached the question of whether relief was available under the Declaratory Judgment Act. *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980); *Wells v. United States*, 280 F.2d 275 (9th Cir. 1970). The *McDaniel* case was a suit brought within the admiralty jurisdiction of this Court. There, we affirmed per curiam the granting of summary judgment because the plaintiff had failed in his attempt to allege that a maritime contract existed or that defendants had breached it. The question of whether the trial court should have dismissed the case for lack of jurisdiction rather than granting summary judgment was not raised.

There are cases where courts have disposed of the *Feres* issue by way of summary judgment. *See, e.g., Mason v. United States*, 568 F.2d 1135 (5th Cir. 1978) (per curiam); *Avila v. United States*, No. EP-80-LA-22 (W.D.Tex., July 24, 1980); *Butterline v. United States*, No. 77-3034 (E.D.Pa. January 8, 1980). However, we have found no case which addresses the precise issue before this Court, or provides any reasoned explanation for why summary judgment can be an appropriate disposition of a case

in which *Feres* applies.[14] There are numerous cases where the courts have granted motions to dismiss based on the *Feres* doctrine. *See, e.g., Charland v. United States, supra; Daly v. United States,* No. 76-2381-A (N.D.Mass.1980); *Sigler v. LeVan,* 485 F.Supp. 187 (D.Md.1980). *Lerner, supra; Nagy, supra; Thornwell, supra.* Moreover, in *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), the Supreme Court found that the district court had properly dismissed the plaintiff's FTCA claims for lack of subject matter jurisdiction because *Feres* applied.

The Supreme Court appears to consider the *Feres* doctrine to be an exception to the waiver of sovereign immunity contained in the FTCA. *See, id,* at 674, 97 S.Ct. at 2079 (Marshall, J., dissenting); *Dalehite v. United States, supra,* 396 U.S. at 31 n.25, 73 S.Ct. at 965 n.25. We conclude, therefore, that the only correct disposition of a case based on *Feres* is dismissal for lack of subject matter jurisdiction since the United States has not consented to the kinds of suits in which *Feres* applies.[15]

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[14] So far as appears, the parties in none of the cases cited by defendants raised this issue. Certainly, it was not reached in either of the per curiam opinions by this Court cited by defendant. *See Mason v. United States, supra; McDaniel v. Travelers Insurance Co., supra.*

[15] Possibly the confusion over this issue has been caused by language in *Feres.* There the court stated:

> Looking to the detail of the Act, it is true that it provides broadly, that the District Court, "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages. . . ." This confers jurisdiction to render judgment upon all such claims. But it does not say that all claims must be allowed. Jurisdic-

Finally, appellees argue that it would be improper for this court to remand this case with leave to amend since any amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962). They contend that *Feres* would bar even a constitutional claim which might be raised by appellants in this case. While we do not express any opinion on the merits of appellant's possible amended claims, we find that Stanley has at least a colorable constitutional claim based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 69 (1971). *See Jaffee v. United States*, No. 79-1543 (February 20, 1980) (petition for rehearing en banc granted, April 11, 1980); *James v. United States*, 358 F.Supp. 1381 (D.R.I.1973).

A court must dismiss a case over which it has no jurisdiction whenever the fatal defect appears. *Ken-*

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tion is necessary to deny a claim on its merits as a matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.

340 F.2d 141. The Supreme Court then dismissed the cases for failure to state a claim. However, subsequent cases have shown that the Supreme Court appears to consider the *Feres* doctrine as an exception to the FTCA's limited waiver of immunity. Perhaps the difficulty stems from the fact that before the Supreme Court handed down its decision in *Feres*, no exception to the Tort Claims Act for activities incident to service existed, and the court correctly had jurisdiction under the Act in the *Feres* case itself to decide the cases before them on a motion to dismiss for failure to state a claim. We do not find that this language in *Feres* requires us to affirm the granting of summary judgment in this case.

tucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 391 (5th Cir. 1977); *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 671-72 (5th Cir. 1978).[16] Leave to amend defective allegations of subject matter jurisdiction should be freely given. *Eklund v. Mora*, 410 F.2d 731 (5th Cir. 1969). See Fed.R.Civ.P. 15(a).

While we approve the determination of the trial court that the plaintiff could not prevail on his complaint, we reverse the order granting summary judgment and remand for the consideration of the trial court of any amendment which the appellant may offer, seeking to cure the jurisdictional defect.

VACATED and REMANDED.

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[16] *See also* Federal Rule Civil Procedure 12(h)(3) which provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

APPENDIX G

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

OFFICE OF THE CLERK
50 Spring Street SW.
Atlanta, Georgia 30303-3147

June 17, 1986

TO ALL PARTIES LISTED BELOW:

No. 84-5273

STANLEY vs. USA, et al.

D.C. Docket No. 78-8141-CIV-JAG

This is to advise that an order has this day been entered denying the petition( ) for rehearing.

—— The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

xx No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

MIGUEL J. CORTEZ
Clerk

By: /s/ Karen B. Sinyard
Deputy Clerk

cc: Mark W. Pennak
Barbara L. Herwig
James Mingle
Richard A. Kupfer

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